(1)

No. 94-7427-CFY Title: Joseph Libretti, Petitioner
Status: GRANTED v.
United States

Docketed: Court: United States Court of Appeals for
December 27, 1994 the Tenth Circuit

Counsel for petitioner: Beale,Sara Sun

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Dec 27 1994	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Jan 19 1995		Order extending time to file response to petition until February 27, 1995.
5	Feb 22 1995		Brief of respondent United States in opposition filed.
6	Mar 2 1995		DISTRIBUTED. March 17, 1995 (Page 18)
8	Mar 20 1995		REDISTRIBUTED. March 24, 1995 (Page 16)
10	Mar 27 1995		Petition GRANTED.
			**********
11	Mar 27 1995	X	Reply brief of petitioner filed.
13	Apr 3 1995		Order extending time to file brief of petitioner on the merits until June 1, 1995.
14	Apr 3 1995	N	Motion of petitioner for appointment of counsel filed. on the merits until June 1, 1995
15	Apr 20 1995	G	Motion of petitioner for appointment of counsel filed.
16	May 1 1995		Motion for appointment of counsel GRANTED and it is ordered that Sara Sun Beale, Esq., of Durham, North Carolina, is appointed to serve as counsel for the petitioner in this case.
18	May 22 1995		Order extending time to file brief of petitioner on the merits until June 30, 1995.
19	Jun 5 1995		Joint appendix filed.
20	Jun 30 1995		Brief amicus curiae of Forfeiture Endangers American Rights filed.
21	Jun 30 1995		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
23	Jul 26 1995		Order extending time to file brief of respondent on the merits until August 4, 1995.
25	Aug 2 1995		Record filed.
		*	Orginial record proceedings U.S. Court of Appeals/Tenth Circuit and U.S. District Court/District of Wyoming.
26	Aug 2 1995		Record filed.
		*	SEALED RECORD (U.S. Court of Appeals/Tenth Circuit) -- PRESENTENCE REPORT AND ADDENDUM.
27	Aug 4 1995		CIRCULATED.
28	Aug 4 1995	X	Brief of respondent United States filed.
29	Sep 5 1995	X	Reply brief of petitioner filed.
24	Sep 26 1995		SET FOR ARGUMENT TUESDAY, OCTOBER 3, 1995. (3RD CASE).
30	Oct 3 1995		ARGUED.

1PP

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NO. _____

94-7427

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

OCTOBER TERM, 1994

JOSEPH V. LIBRETTI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

RECEIVED
DEC 27 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Joseph V. Libretti, Jr., by and through his court appointed counsel, Jenine Jensen, Assistant Federal Public Defender, respectfully requests this Honorable Court for leave to proceed in forma pauperis in applying for a Writ of Certiorari. As grounds therefore he states that undersigned counsel was appointed pursuant to the Criminal Justice Act, was appointed by the United States Court of Appeals for the Tenth Circuit, and he is unable to retain counsel and pay for costs attendant to the proceedings before this Honorable Court.

WHEREFORE, the Petitioner respectfully requests that he be granted leave to proceed in forma pauperis.

Respectfully submitted,

JENINE JENSEN
Attorney at Law
1099 18th Street, Plaza Tower, #300
Denver, Colorado 80202
(303) 294-7002

Supreme Court, U.S.
FILED
DEC 27 1994
OFFICE OF THE CLERK

21pp

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOSEPH V. LIBRETTI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

MICHAEL G. KATZ
Federal Public Defender

JENINE JENSEN
Assistant Federal Public Defender
1099 18th Street, Plaza Tower, #300
Denver, Colorado 80202
(303) 294-7002

QUESTIONS PRESENTED

I. WHETHER THE TENTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT A SENTENCING JUDGE IS NOT REQUIRED UNDER FED. R. CRIM. P. RULE 11(f) TO DETERMINE WHETHER THERE IS A FACTUAL BASIS FOR A DEFENDANT'S AGREEMENT TO A CRIMINAL FORFEITURE UNDER 21 U.S.C. § 853, ENTERED PURSUANT TO A PLEA AGREEMENT.

II. WHETHER THE TENTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT A DEFENDANT NEED NOT SPECIFICALLY WAIVE HIS RIGHT TO A JURY TRIAL ON FORFEITURE ISSUES.

List of Parties Below

1. United States of America
2. Joseph V. Libretti, Jr.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
I. WHETHER THE TENTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT A SENTENCING JUDGE IS NOT REQUIRED UNDER FED. R. CRIM. P. RULE 11(f) TO DETERMINE WHETHER THERE IS A FACTUAL BASIS FOR A DEFENDANT'S AGREEMENT TO A CRIMINAL FORFEITURE UNDER 21 U.S.C. § 853, ENTERED PURSUANT TO A PLEA AGREEMENT.	i
II. WHETHER THE TENTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT A DEFENDANT NEED NOT SPECIFICALLY WAIVE HIS RIGHT TO A JURY TRIAL ON FORFEITURE ISSUES.	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PRAYER	1
OPINION BELOW	1
JURISDICTION	1
RULES AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	7
AFFIDAVIT OF SERVICE	8
Opinion in United States v. Libretti, 38 F.3d 523 (10th Cir. 1994).	Appendix A

TABLE OF AUTHORITIES

	Page
United States v. Bachynsky, 949 F.2d 722 (5th Cir. 1991), cert. denied, 113 S. Ct. 150 (1992)	5
United States v. Boatner, 966 F.2d 1575 (11th Cir. 1992)	5
United States v. Garrett, 727 F.2d 1003 (11th Cir. 1984), aff'd on other grounds, 471 U.S. 773 (1985)	5
United States v. Libretti, 38 F.3d 523 (10th Cir. 1994)	1, 4-6
United States v. Reckmeyer, 786 F.2d 1216 (4th Cir.), cert. denied, 479 U.S. 850 (1986)	4
United States v. Roberts, 749 F.2d 404 (7th Cir. 1984), cert. denied, 470 U.S. 1058 (1985)	4
United States v. Robinson, 8 F.3d 418 (7th Cir. 1993)	6

STATUTES

21 U.S.C. § 848	2
21 U.S.C. § 853	i, 2
21 U.S.C. § 853(a)	1, 2
28 U.S.C. § 1254(1)	1

OTHER

Fed. R. Crim. P. 11(f)	i, 2, 4, 5, 7
Fed. R. Crim. P. 31(e)	6
Supreme Court Rule 10.1.(a) and (c)	7

PRAYER

The petitioner, Joseph V. Libretti, Jr., respectfully prays that a writ of certiorari be issued to review the order and judgment of the United States Court of Appeals for the Tenth Circuit issued on October 19, 1994.

OPINION BELOW

A copy of the order and judgment issued by the United States Court of Appeals for the Tenth Circuit in the case of United States v. Libretti, 38 F.3d 523 (10th Cir. 1994) is attached as Appendix A.

JURISDICTION

On October 19, 1994, the United States Court of Appeals for the Tenth Circuit entered its order and judgment affirming the judgment of the United States District Court for the District of Wyoming. Jurisdiction in this Court is conferred by 28 U.S.C. § 1254(1).

RULES AND STATUTES INVOLVED

21 U.S.C. § 853(a) provides:

> Any person convicted of a violation of this subchapter . . . punishable by imprisonment for more than one year shall forfeit in the United States, . . .
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
>
> (3) in the case of a person convicted of [CCE] . . . , the person shall [also] forfeit . . . any of his interest in, claims against, and property or contractual rights affording a source of control over, the [CCE].

Fed. R. Crim. P. Rule 11(f) states that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

STATEMENT OF THE CASE

In this case, the Tenth Circuit decided two issues of first impression that have resulted in splits among the circuits, and that have not been addressed by this Court.

Mr. Libretti pled guilty to one count of continuing criminal enterprise (CCE) in violation of 21 U.S.C. § 848. He was sentenced to 20 years imprisonment and a fine. In addition, the district court entered a criminal forfeiture order pursuant to 21 U.S.C. § 853(a).

Petitioner's plea agreement provided that he would agree to criminal forfeiture of his assets under § 853. It stated:

> 10. The Defendant agrees to transfer his right, title, and interest in all of his assets to the Division of Criminal Investigation of the Wyoming Attorney General including, but not limited to: all real estate; all personal property, including guns, the computer, and every other item now in the possession of the United States; all bank accounts, investments, retirement accounts,

cash, cashier's checks, travelers checks and funds of any kind.

At the change of plea hearing, the judge explained to the petitioner that the forfeiture applied to "the property that is owned by you by reason of any drug transaction." The judge then advised:

> And then under the topic Forfeiture, [the indictment] alleges that upon conviction of the defendant for engaging in a continuing criminal enterprise, the United States is entitled to forfeiture of all property of any kind constituting or derived from proceeds Libretti obtained directly and indirectly by engaging in said continuing criminal enterprise; all property of any kind which was used or intended for use in any manner or part to commit or to facilitate the commission of this criminal -- continuing criminal enterprise, including but not limited to the following, and then there is listed real property, your lot in Star Valley [Wyoming], conveyances of two vehicles, cash proceeds over a hundred thousand dollars and then another $12,000 and a five -- 5,100 and 7,600 amount in currency and jewelry and property consisting of a mobile home and a computer system, bank accounts that are listed in the Indictment, investments that are listed in the Indictment, and additional cashier's checks and the contents of safe deposit boxes, and that's it.

The petitioner was not advised of, and did not waive, his right to a jury trial on the issue of which assets were actually subject to forfeiture. Likewise, the judge made no findings of any factual basis for the forfeiture plea.

At sentencing, the judge granted the forfeiture order. Petitioner's counsel did not object. The petitioner did, saying "I would just like to object to what I see as a failure to find any

factual basis for the whole forfeiture, just for the record." The judge overruled his objection.

Petitioner filed a notice of appeal from the forfeiture order. He filed a pro se Opening Brief and undersigned counsel was appointed to file a Supplemental Opening Brief. The key issues raised on appeal were (1) whether the district court erred by ordering forfeiture of nonforfeitable property and failing to make findings of a factual basis for forfeiture; and (2) whether petitioner was entitled to be advised, as part of entering his guilty plea, that he had the right to a jury trial on the forfeiture issue (apart from any trial on the drug offense itself).

In its decision, the Tenth Circuit noted: "Whether Rule 11(f) applies to a stipulated forfeiture in a plea agreement is an issue of first impression in this circuit." United States v. Libretti, 38 F.3d 523, 537 (10th Cir. 1994). The court also noted the "divergent conclusions" reached by four other Circuits. Id. at 528.

The Seventh Circuit has held that Rule 11(f) applies to forfeitures that are included as part of the plea agreement. United States v. Roberts, 749 F.2d 404 (7th Cir. 1984), cert. denied, 470 U.S. 1058 (1985).

The Fourth Circuit has held that a defendant's agreement to forfeit an item in the plea agreement does not, without more, make the item forfeitable. United States v. Reckmeyer, 786 F.2d 1216, 1222 (4th Cir.), cert. denied, 479 U.S. 850 (1986) (Rule 11(f) requires the district court to inquire beyond the plea agreement to

determine if there is a factual basis for forfeiture of the assets).

The Fifth Circuit has held that the Rule 11(f) requirement of a factual basis for the plea does not apply to a forfeiture order. United States v. Bachynsky, 949 F.2d 722, 730 (5th Cir. 1991), cert. denied, 113 S. Ct. 150 (1992) (defendant has the burden to establish an inadequate factual basis for a forfeiture order, in the absence of a timely objection).

The Eleventh Circuit has squarely held to the contrary. That Circuit has held that because an agreement to plead to forfeiture is not an agreement to "plea to a substantive charge," Rule 11(f) does not apply. United States v. Boatner, 966 F.2d 1575, 1581 (11th Cir. 1992).

In Libretti, the Tenth Circuit adopted the Eleventh Circuit's Boatner reasoning. 38 F.3d at 528. Applying that analysis, the court held that the district court properly ordered forfeiture of all defendant's assets, regardless of whether they had any connection with his drug dealings in general or the CCE conviction in particular, "based on defendant's written agreement and knowing and voluntary ratification of that agreement at the change of plea hearing." Libretti, 38 F.3d at 530.

The second issue on appeal arose from petitioner's right to a jury trial on the forfeiture issues. The Court again faced another "apparent[] split [in the circuits] on the issue of a constitutional right to a jury trial on forfeiture." Libretti, 38 F.3d at 530. Compare United States v. Garrett, 727 F.2d 1003, 1012

& n.6 (11th Cir. 1984) (defendant has a constitutional right to a jury trial in a 21 U.S.C. § 848 proceeding to determine if an asset is forfeitable), aff'd on other grounds, 471 U.S. 773 (1985) with United States v. Robinson, 8 F.3d 418, 420 (7th Cir. 1993) (defendant may not have a constitutional right to jury trial on forfeiture issues, but does have the statutory right to a jury determination under Fed. R. Crim. P. 31(e)). Rather than address the constitutional issue, the Circuit agreed that the petitioner had a statutory right to a jury trial, but concluded that he had knowingly and voluntarily waived it. Libretti, 38 F.3d at 530. See Robinson, 8 F.3d at 421 (constitutional waiver principles applied to analyze whether defendant waived his statutory right to a jury trial).

Neither the in-court advisement nor the plea agreement in this case informed the petitioner that he had a statutory or constitutional right to a jury trial. Libretti, 38 F.3d at 531. Thus, the petitioner was never aware of any right to a jury trial on the forfeiture. "The right to a jury trial is personal to a defendant and one which he alone may waive." Robinson, 8 F.3d at 423 (internal quotations omitted). Despite this, the Circuit held that "specific reference to a jury trial on forfeiture issues was not necessary in light of the unambiguous plea agreement and defendant's knowing and voluntary plea." Libretti, 38 F.3d at 531. This conclusion is wrong, because a defendant cannot knowingly and voluntarily waive a right of which he has not been advised.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1.(a, c) states that certiorari review may be appropriate when "a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter," and when a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court.

This case fits within both parameters. The forfeiture/Rule 11(f) question had already created a split in the federal circuits. After the Tenth Circuit decision adopting the minority view, the split is 3-2. In addition, this is an important issue not yet addressed by the Supreme Court.

The same analysis applies to the second issue (right to jury trial), where the split in the federal circuits is now 2-1.

CONCLUSION

For these reasons, the petitioner respectfully requests that this Court issue a petition for writ of certiorari.

Respectfully submitted,

MICHAEL G. KATZ
Federal Public Defender

JENINE JENSEN
Assistant Federal Public Defender
1099 18th Street, Plaza Tower, #300
Denver, Colorado 80202
(303) 294-7002

dant either had guilty
is "indifference to the
ade to induce others to
udulent intent." *Unit-*
24 F.2d 963, 965 (10th
t intent is also a neces-
n 2314. *United States*
1322, 1329 (7th Cir.),
908, 106 S.Ct. 3284, 91
Jnited States v. Miller,
Cir.1984). In addition,
: show that the defen-
e intent to commit the
ility as a principal un-
d States v. Self, 2 F.3d
.1993) (quoting *United*
F.2d 436, 441 (10th
d, 490 U.S. 1036, 109
2d 407 (1989)); *see also*
tes, 366 F.2d 474, 476
ng and abetting implies

government clearly did
of establishing that de-
necessary mental state
crimes. In a colloquy
at his Change of Plea
dmitted that the gov-
all of the allegations
ation beyond a reason-
rmation states that de-
in the advanced fee
ribed ... in the indict-
m, it is apparent that
l in the crime: He ob-
forwarded the applica-
Centurion organization.
, does not automatical-
of the scheme.

alied on the indictment
ndant had violated sec-
his plea arrangement,
ly admitted to the con-
n; he did not admit to
es contained in the In-
to place emphasis on
ooking for proof that a
tted. "The purpose of
form the defendant of
se charged." *Smith v.*
United States, 273 F.2d 462, 466 (10th Cir. 1959), *cert. denied*, 363 U.S. 846, 80 S.Ct. 1619, 4 L.Ed.2d 1729 (1960). "[An indictment] is not evidence that the offense charged was committed." *United States v. Glaziou*, 402 F.2d 8, 15 (2nd Cir.1968), *cert. denied*, 393 U.S. 1121, 89 S.Ct. 999, 22 L.Ed.2d 126 (1969). Because the government offered no other evidence of racketeering activity, we find that the government did not show by a preponderance of the evidence that defendant violated section 1961. Accordingly, defendant's sentence cannot be increased under section 2T1.2(b)(1).

Having decided that section 2T1.2(b)(1) does not apply, the question of defendant's appropriate original base level is no longer moot. Whether defendant's base level should be six or eight is a factual determination that the district court must resolve. We therefore remand the case for resentencing in accordance with this opinion.

III. CONCLUSION

The decision of the trial court is **REVERSED** and defendant is **REMANDED** for resentencing.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Joseph V. LIBRETTI, Jr.,
Defendant-Appellant.

No. 93-8000.

United States Court of Appeals,
Tenth Circuit.

Oct. 19, 1994.

Following guilty plea in which he agreed to forfeiture of assets, defendant was convicted in the United States District Court for the District of Wyoming, Clarence A. Brimmer, Jr., J., of continuing criminal enterprise. Following defendant's appeal of order of forfeiture of all his property, the district court granted defendant's motion to stay forfeiture and amended forfeiture order to delete certain property owned by third parties. The Court of Appeals, Logan, Circuit Judge, held that: (1) appeal from order of forfeiture was not moot; (2) Court of Appeals had jurisdiction to consider appeal notwithstanding fact that district court had granted motion for stay and amended forfeiture order; (3) sentencing judge was not required to determine whether there was factual basis for defendant's concession to criminal forfeiture pursuant to plea bargain; (4) defendant's agreement to guilty plea in which he agreed to forfeiture of all property was knowing and voluntary; (5) defendant was bound by terms of unambiguous plea agreement forfeiting all his property; (6) defendant's waiver of right to jury trial to determine which property was subject to forfeiture was valid; and (7) forfeiture was not excessive fine and was constitutional.

Order of forfeiture affirmed, government's motion to dismiss denied, and defendant's motion for limited remand denied as moot.

1. Forfeitures ⇐5

Appeal from order of forfeiture was not moot where issues raised by appeal were still "live" and defendant had interest in outcome of appeal, notwithstanding facts that defendant pleaded guilty to charge and consented to forfeiture of his assets.

2. Criminal Law ⇐990.1, 1023(11)
Forfeitures ⇐5

Sentencing decision is final decision for purposes of appeal, and order of criminal forfeiture is part of sentencing decision. 28 U.S.C.A. § 1291.

3. Criminal Law ⇐1023(11)

If defendant timely moves to correct sentence, motion renders otherwise final order nonfinal until district court disposes of motion. Fed.Rules Cr.Proc.Rule 35(c), 18 U.S.C.A.

4. Forfeitures ⇐5

Requested modification of forfeiture order was beyond scope of relief available on motion to correct sentence where request to amend order of forfeiture was not made within permissible time period and was therefore not timely motion to correct sentence. Fed. Rules Cr.Proc.Rule 35(c), 18 U.S.C.A.

5. Forfeitures ⇐10

Although district court has jurisdiction to consider third-party claims to property which has been ordered forfeited as part of criminal sentence, after notice of appeal is filed district court lacks jurisdiction to consider defendant's claims to forfeited property. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 413(n), as amended, 21 U.S.C.A. § 853(n).

6. Forfeitures ⇐5

Court of appeals had jurisdiction to consider appeal by defendant of order of criminal forfeiture notwithstanding fact that district court, after entry of order of forfeiture and filing of notice of appeal by defendant, had granted defendant's motion for stay of forfeiture and amended forfeiture order to delete certain property owned by third parties. 28 U.S.C.A. § 1291.

7. Forfeitures ⇐2

Cases applying Racketeer Influenced and Corrupt Organizations (RICO) forfeiture statute may be used to construe criminal forfeiture statute due to similarity of two statutes. 18 U.S.C.A. § 1963; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 413, as amended, 21 U.S.C.A. § 853.

8. Criminal Law ⇐273(4.1)

Sentencing judge is not required to determine whether there is factual basis for defendant's concession to criminal forfeiture made pursuant to plea bargain with government. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 413, as amended, 21 U.S.C.A. § 853; Fed.Rules Cr. Proc.Rule 11(f), 18 U.S.C.A.

9. Criminal Law ⇐273.1(2)

Lawful plea agreement is enforceable, and as long as agreement as lawful, defendant should be bound by its terms.

10. Criminal Law ⇐1139

Voluntariness of guilty plea is question of federal law subject to de novo review.

11. Criminal Law ⇐273.1(1)

Guilty plea must be knowing and voluntary, and defendant's decision to plead guilty must be deliberate and intelligent and chosen from available alternatives.

12. Criminal Law ⇐273.1(4)

District court is required to ensure that defendant who enters guilty plea understands nature of charge and mandatory minimum and maximum penalties.

13. Criminal Law ⇐273.1(2, 4)

Guilty plea in which defendant agreed to forfeiture of all property owned by reason of any drug transaction was voluntarily given and enforceable where defendant stated that he had signed, read, and understood plea agreement and had no questions and that he understood consequences of his plea including that all of his property owned by reason of any drug transaction could be forfeited, nothing in record indicated that defendant's plea would have been different if he had been questioned further about forfeitability of his assets, and defendant received favorable plea agreement.

14. Criminal Law ⇐273.1(2)

Defendant was bound by terms of plea agreement in which he unambiguously forfeited all of his property, notwithstanding extraneous statements by district court that defendant was only forfeiting assets listed in continuing criminal enterprise count of indictment or from his drug trade. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 413, as amended, 21 U.S.C.A. § 853.

15. Jury ⇐19(15)

Defendant has statutory right to have jury determine which of his assets may be forfeited. Fed.Rules Cr.Proc.Rule 31(e), 18 U.S.C.A.

16. Jury ⇐29(6)

Defendant has burden of proving that waiver of right to have jury determine which portion of his property was subject to forfeiture was not valid. Fed.Rules Cr.Proc.Rule 31(e), 18 U.S.C.A.

17. Jury ⇐29(6)

Valid waiver of jury trial depends on unique facts of each case.

18. Jury ⇐29(6)

Specific waiver of defendant's right to jury trial to determine which portion of his property was subject to forfeiture was not necessary, and unambiguous plea agreement and knowing and voluntary plea of guilty to charges was sufficient to waive right to jury trial, where district court told defendant that by pleading guilty he gave up right to jury trial, defendant stated that he understood rights and chose to plead guilty, and there was no evidence that defendant wanted jury trial on forfeiture issue or thought he was going to have one, notwithstanding facts that district court did not specifically indicate that plea agreement negated jury trial on forfeiture issues and plea agreement did not mention forfeiture in waiving jury trial. Fed. Rules Cr.Proc.Rule 31(e), 18 U.S.C.A.

19. Criminal Law ⇐1214

Courts must consider all factors when evaluating whether forfeiture is an unconstitutionally excessive fine. U.S.C.A. Const. Amend. 8.

20. Criminal Law ⇐1214
Forfeitures ⇐3

Forfeiture of property was not an unconstitutionally excessive fine where plea agreement stated that property up to $1,500,000 could be forfeited, actual value of property forfeited was $410,000, defendant was fined $5,000, and maximum penalty for offense to which defendant pled guilty was fine of up to $2,000,000 and forfeiture. U.S.C.A. Const. Amend. 8; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(a), as amended, 21 U.S.C.A. § 848(a).

David D. Freudenthal, U.S. Atty., David A. Kubichek, Asst. U.S. Atty., D. Wyo., Casper, WY, for plaintiff-appellee.

Michael G. Katz, Federal Public Defender, Jenine Jensen, Asst. Federal Public Defender, Denver, CO, for defendant-appellant.

Defendant-appellant Joseph V. Libretti, Jr. also filed pro se briefs.

Before LOGAN and BARRETT, Circuit Judges, and RUSSELL,* District Judge.

LOGAN, Circuit Judge.

Defendant Joseph V. Libretti, Jr. appeals from an order of criminal forfeiture. He contends that (1) the district court erred in not making factual findings as to the forfeitability of assets; (2) he was not advised of and did not waive his right to a jury trial on the forfeiture issues; and (3) even if his assets were properly forfeited, the forfeiture order violated the Excessive Fines Clause of the Eighth Amendment. We exercise jurisdiction under 18 U.S.C. § 3742(a) and affirm the order of forfeiture.[1]

A grand jury returned a superseding indictment against defendant containing eleven counts of various drug, firearms, and money laundering violations, including continuing criminal enterprise (CCE), 21 U.S.C. § 848. After one week of trial, defendant entered into a plea agreement. Pursuant to that agreement, he pleaded guilty to the CCE count and to forfeiture of "all known assets as prescribed in 21 U.S.C. § 853 and assets which are discovered at any later time up to $1,500,000." I R. tab 210 at 2. The plea agreement further provided that defendant would forfeit

> his right, title, and interest in all of his assets ... including, but not limited to: all real estate; all personal property, including guns, the computer, and every other

* Honorable David L. Russell, District Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

1. After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The case is therefore ordered submitted without oral argument.

item now in the possession of the United States; all bank accounts, investments, retirement accounts, cash, cashier's checks, travelers checks and funds of any kind.

Id. at 3. In exchange for defendant's plea agreement the government agreed to recommend the minimum sentence applicable to a CCE conviction, twenty years imprisonment, and not to pursue other criminal charges against him.

At the change of plea hearing, the district court questioned defendant regarding the voluntariness of his guilty plea. The district court also advised defendant about the forfeiture:

> And then under the topic Forfeiture, it alleges that upon conviction of the defendant for engaging in a continuing criminal enterprise, the United States is entitled to forfeiture of all property of any kind constituting or derived from proceeds [defendant] obtained directly and indirectly by engaging in said continuing criminal enterprise; all property of any kind which was used or intended for use in any manner or part to commit or to facilitate the commission of this criminal—continuing criminal enterprise, including but not limited to the following, and then there is listed real property, your lot in Star Valley, conveyances of two vehicles, cash proceeds over a hundred thousand dollars and then another $12,000 and a five—5,100 and 7,600 amount in currency and jewelry and property consisting of a mobile home and a computer system, bank accounts that are listed in the Indictment, investments that are listed in the Indictment, the additional cashier's checks and the contents of safe deposit boxes, and that's it.

II R. 18–19. The district court further stated that the forfeiture applied to all property owned by defendant "by reason of any drug transaction." *Id.* at 21. Defendant admitted that he understood the indictment and plea agreement including the provisions concerning forfeiture. *Id.* at 19–21. The district court approved the plea agreement after determining the guilty plea was voluntary and factual.

The district court later sentenced defendant to twenty years imprisonment, five years supervised release, a $5,000 fine, a $50 special assessment, and 500 hours of community service.[2] The district court also granted forfeiture pursuant to the plea agreement. At the conclusion of the sentencing hearing, defendant objected to the failure of the district court to find a factual basis for the whole forfeiture. XIII R. 25 (record in appeal No. 93–8001). The district court noted the objection, but determined that there was sufficient evidence to warrant granting forfeiture. On December 23, 1992, the district court entered an order of forfeiture pursuant to 21 U.S.C. § 853. The order stated that defendant "agreed to forfeit all property," I R. tab 259 at 1, and then specifically listed property to be forfeited. Defendant appealed from the order of forfeiture.

Subsequently, the district court held a hearing on defendant's motions for stay and to amend the forfeiture order and on third party claims to the forfeited property, all made on or after January 19, 1993. On February 12, 1993, the district court determined that ownership of certain items of forfeited property was in dispute and that because it was willing to consider defendant's motion to amend, the December 23, 1992 order was not final. The district court stated that defendant's appeal was premature and then scheduled a hearing to consider ownership of the disputed property.

After the hearing the district court amended the forfeiture order to delete certain property owned by third parties. The district court also ordered the magistrate judge to conduct fact finding hearings to address additional third party interests in certain property listed in the forfeiture order to consider whether it was in fact forfeitable. The government filed motions for reconsideration and to stay proceedings before the magistrate judge pending appeal. V R. tabs 353, 374 (record in appeal No. 93–8001). The district court granted the motion for stay.

I

[1–4] We first consider whether the district court's actions after the notice of appeal was filed deprives us of jurisdiction.[3] We have jurisdiction to consider a final decision of the district court. 28 U.S.C. § 1291. A sentencing decision is a final decision, *see Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798, 109 S.Ct. 1494, 1497–98, 103 L.Ed.2d 879 (1989); *United States v. Snell*, 922 F.2d 588, 590 (10th Cir.1990), and, as defendant concedes, a forfeiture is part of the criminal sentence. *United States v. Elgersma*, 971 F.2d 690, 694 (11th Cir.1992) (21 U.S.C. § 853(a) makes clear that forfeiture is part of punishment); *United States v. Hernandez–Escarsega*, 886 F.2d 1560, 1577 (9th Cir.1989) (same), *cert. denied*, 497 U.S. 1003, 110 S.Ct. 3237, 111 L.Ed.2d 748 (1990); *United States v. Sandini*, 816 F.2d 869, 875 (3d Cir.1987) (same); *see United States v. Songer*, 842 F.2d 240, 241 (10th Cir.1988) (forfeiture treated as part of sentence).[4]

[5, 6] Although the district court has jurisdiction to consider third party claims to property, *see* 21 U.S.C. § 853(n) (providing means for third parties to obtain their property which has been forfeited), after a notice of appeal is filed, the district court lacks jurisdiction to consider a defendant's claims. *See Berman v. United States*, 302 U.S. 211, 214, 58 S.Ct. 164, 166, 82 L.Ed. 204 (1937). Thus, any subsequent actions by the district court do not defeat our jurisdiction.

II

Defendant argues that the district court erred in ordering forfeiture of the nonforfeitable property in light of his objection at the sentencing and the court's own post-judgment rulings. He alleges that factual findings must be made establishing that the assets to be forfeited are part of a continuing series of offenses. Defendant maintains that the trial testimony and change of plea and sentencing hearings show that there was not a sufficient nexus to support a forfeiture of accounts containing legitimate earnings such as his employee savings plan, IRA accounts, and bank accounts containing his paychecks.

Federal Rule of Criminal Procedure 11(f) provides that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."[5] The government contends that Rule 11(f) applies only to the guilty plea and imposes no duty on the district court to ensure a sufficient factual basis exists to support the stipulated forfeiture in the plea agreement. Whether Rule 11(f) applies to a stipulated forfeiture in a plea agreement is an issue of first impression in this circuit. Four circuits have con-

2. Defendant appeals the imposition of the fine and the requirement of community service in appeal No. 93–8001, also decided and affirmed today.

3. The government has also filed a motion to dismiss this appeal as moot. The government contends that because defendant pleaded guilty to CCE and consented to forfeit his assets he lacks a legally cognizable interest in the outcome of the appeal. "In general a case becomes moot '"when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."'" *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 100 S.Ct. 1202, 1208–09, 63 L.Ed.2d 479 (1980), quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1950–51, 23 L.Ed.2d 491 (1969)). Because defendant has appealed the order of forfeiture, as is discussed hereafter, the issues in this case are still "live," and defendant has an interest in the outcome of this appeal. *Cf. United States v. Fischer*, 833 F.2d 647, 648 (7th Cir.1987) (prosecutor's appeal from district court's order granting defendant reimbursement of funds was moot once forfeiture of funds was established under plea agreement and plea agreement and order of forfeiture were not contested). Accordingly, the appeal is not moot.

4. If, however, a defendant timely moves to correct sentence pursuant to Fed.R.Crim.P. 35(c), that motion renders an otherwise final order nonfinal until the district court disposes of the motion. *United States v. Corey*, 999 F.2d 493, 494–96 & 496 n. 3 (10th Cir.), *cert. denied*, —— U.S. ——, 114 S.Ct. 374, 126 L.Ed.2d 473 (1993). Rule 35(c) permits the district court to correct a sentence imposed as a result of technical, arithmetic, or other clear error within seven days of the imposition of sentence. Here, defendant's request to amend the order of forfeiture was not made within the permissible time period and is therefore not a timely Rule 35(c) motion, *see Corey*, 999 F.2d at 494–96, and the requested modification of the forfeiture order was beyond the scope of Rule 35(c) relief.

5. Defendant also contends that Fed.R.Crim.P. 32(c)(3)(D) requires factual findings when a defendant alleges an inaccuracy in the presentence report. Because the district court did not rely on any alleged inaccuracies in the presentence report when it entered its order of forfeiture, after defendant stipulated to forfeiture within his guilty plea, we focus our analysis on Rule 11(f).

sidered this issue and have reached divergent conclusions.

[7] In *United States v. Roberts*, 749 F.2d 404, 409 (7th Cir.1984) (a RICO case), *cert. denied*, 470 U.S. 1058, 105 S.Ct. 1770, 84 L.Ed.2d 830 (1985),[6] the Seventh Circuit held that Rule 11(f) applies to forfeitures included as part of a plea agreement just as it applies to the guilty plea. "The mere fact that the defendant has agreed that an item is forfeitable, in a plea agreement, does not make it so; the trial court must ascertain whether it [is forfeitable]." *Id.* "A defendant's waiver of his right to trial cannot be said to have a factual basis, where a forfeiture of property is involved, unless the property is in fact subject to forfeiture." *Id.* at 410.

In *United States v. Reckmeyer*, 786 F.2d 1216 (4th Cir.), *cert. denied*, 479 U.S. 850, 107 S.Ct. 177, 93 L.Ed.2d 113 (1986), the Fourth Circuit agreed with the reasoning in *Roberts* that a defendant's mere agreement to forfeit an item in the plea agreement does not make the item forfeitable. The court held that Rule 11(f) "requires the district court to inquire beyond the agreement to determine if there is a factual basis for the forfeiture of the assets." *Id.* at 1222. That court determined, however, that the record of the Rule 11 proceeding established a sufficient factual basis for the forfeiture.

The Fifth Circuit took a more lenient approach in *United States v. Bachynsky*, 949 F.2d 722, 730 (5th Cir.1991), *cert. denied*, —— U.S. ——, 113 S.Ct. 150, 121 L.Ed.2d 101 (1992), when it held "that the requirement of Rule 11(f) that the factual basis for a plea be established at the plea hearing does not apply to an order of forfeiture." It determined the district court's order of forfeiture would be upheld if the record provided a factual basis for forfeiture. *Id.* (citing *United States v. Crumbley*, 872 F.2d 975, 977 (11th Cir. 1989)). Although the court acknowledged the statement in *Reckmeyer* that a defendant's mere acquiescence in a plea agreement that an item is forfeitable does not make it so, it further recognized that the defendant's affirmative answers to questions at the plea hearing creates a substantial burden to overcome. Because the defendant in *Bachynsky* had never objected at sentencing to the forfeiture provisions of the plea agreement, nor provided evidence challenging whether the property was acquired or maintained by racketeering, the Fifth Circuit concluded that the defendant had not established an inadequate factual basis for the forfeiture.

The Eleventh Circuit rejected the analysis of *Reckmeyer* and *Roberts*. *United States v. Boatner*, 966 F.2d 1575, 1581 (11th Cir. 1992),[7] held "that a sentencing judge is not required under Rule 11 to determine whether there is a factual basis for a defendant's concession to a criminal forfeiture pursuant to his plea bargain with the government." The court reasoned that because the forfeiture provision is "not a plea to a substantive charge, but a sanction to which the parties agree as a result of the defendant's plea," Rule 11(f) only applies to the guilty plea. *Id.* Because the defendant in *Boatner* agreed to forfeit property as a result of a bargained for exchange between the parties, the court affirmed the order of forfeiture.

[8] We agree with the holding and reasoning in *Boatner*. The parties both acknowledge that criminal forfeiture under § 853 is a part of the sentence, not a part of the substantive offense. The courts in *Roberts*, *Reckmeyer*, and *Bachynsky* fail to note this distinction. We question whether the Seventh Circuit would continue to apply the holding in *Roberts* in light of its more recent determinations that forfeiture is not an element of the offense but rather is punishment for an offense when a conviction has been

6. Cases applying the RICO forfeiture statute, 18 U.S.C. § 1963, may be used to construe § 853 due to the similarity of the two statutes. *United States v. Bissell*, 866 F.2d 1343, 1348 n. 3 (11th Cir.), *cert. denied*, 493 U.S. 849, 876, 110 S.Ct. 146, 213, 107 L.Ed.2d 104, 166 (1989).

7. The Eleventh Circuit previously had this forfeiture issue before it in *Crumbley*, 872 F.2d 975. In that case the court assumed, without deciding, that Rule 11(f) applied to the forfeiture portion of the plea agreement and determined that the rule is satisfied if the entire record provides a factual basis for the forfeiture. *Id.* at 976. *Boatner*, however, essentially overrules *Crumbley*. *See United States v. Herndon*, 982 F.2d 1411, 1417 (10th Cir.1992).

entered. *See United States v. Simone*, 931 F.2d 1186, 1199 (7th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 584, 116 L.Ed.2d 609 (1991); *United States v. Herrera*, 893 F.2d 1512, 1541 (7th Cir.), *cert. denied*, 496 U.S. 927, 110 S.Ct. 2623, 110 L.Ed.2d 644 (1990).

[9] In addition, it is settled law that a lawful plea agreement is enforceable. *United States v. Khan*, 835 F.2d 749, 752 (10th Cir.1987), *cert. denied*, 487 U.S. 1222, 108 S.Ct. 2881, 101 L.Ed.2d 915 (1988). The government and a defendant and his attorney may arrive at a bargain "that a specific sentence is the appropriate disposition of the case." Fed.R.Crim.P. 11(e)(1)(C); *see United States v. Benchimol*, 471 U.S. 453, 455, 105 S.Ct. 2103, 2104–05, 85 L.Ed.2d 462 (1985). As long as the plea agreement is lawful, a defendant should be bound by its terms. *United States v. Alexander*, 869 F.2d 91, 94 (2d Cir.1989).

Defendant argues that the plea agreement and, therefore, his guilty plea, were not lawful and should not be enforced because he agreed to forfeit only the assets listed in the indictment or only property directly associated with the drug transactions. He contends that the plea agreement is ambiguous and vague and he would not have knowingly and voluntarily agreed to forfeit all of his property.

[10–12] The voluntariness of a guilty plea is a question of federal law subject to de novo review. *United States v. Rhodes*, 913 F.2d 839, 843 (10th Cir.1990), *cert. denied*, 498 U.S. 1122, 111 S.Ct. 1079, 112 L.Ed.2d 1184 (1991). A guilty plea must be knowing and voluntary. *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971); *United States v. Elias*, 937 F.2d 1514, 1517 (10th Cir.1991). A defendant's decision to plead guilty must be deliberate and intelligent and chosen from available alternatives. *Rhodes*, 913 F.2d at 843. "[T]o determine whether a plea is voluntary, a court must assess whether the defendant fully understood the consequences of the plea." *United States v. Williams*, 919 F.2d 1451, 1456 (10th Cir.1990), *cert. denied*, 499 U.S. 968, 111 S.Ct. 1604, 113 L.Ed.2d 667 (1991). The defendant's attorney "and the court have a duty to apprise the defendant of the consequences of the plea and ensure that it is voluntary." *Id.* Federal Rule of Criminal Procedure 11(c)(1) requires that a district court must, among other things, ensure the defendant understands the nature of the charge and the mandatory minimum and maximum penalties. *Elias*, 937 F.2d at 1517.

[13] In this case, the district court thoroughly assessed whether defendant understood the consequences of the guilty plea. The court informed him that all property described in the CCE count of the indictment could be forfeited. II R. 7. Defendant only questioned the extent to which the $1,500,000 limit on forfeiture applied to future legitimate earnings. His attorney and the district court agreed that the $1,500,000 limit applied only to products of drug transactions and not to legitimate future earnings. *Id.* at 3–9. Thereafter, defendant stated that he had signed, read, and understood the plea agreement, and that he had no questions about it. *Id.* at 19–20. He further stated that he understood the consequences of his plea, including that all of his property owned by reason of any drug transaction could be forfeited. *Id.* at 21. Defendant conceded that he was pleading guilty because of the trial testimony received thus far. *Id.* at 22.

Nothing in the record indicates defendant's plea would have been different if he had been questioned further about forfeitability of his assets. He intended to forfeit all of his property without requiring the government to prove the assets were forfeitable. The plea agreement requires forfeiture pursuant to § 853, which includes forfeitable assets under § 853(a) and substitute assets under § 853(p). *See also* 21 U.S.C. § 853(o) (§ 853 is to be liberally construed).

Further, defendant received a favorable plea agreement. In exchange for forfeiting all of his property, the government recommended the minimum sentence of twenty years imprisonment and agreed to drop all other counts in the indictment. One of those counts charged him with use of firearms with silencers in drug trafficking which mandates, upon conviction, a thirty-year sentence consecutive to the sentence on the underlying drug offense. Defendant entered into the

plea agreement after the government presented overwhelming evidence of his guilt. He now seeks the benefit of that bargain, but only to the extent it favors him. We will not require the government to undergo a fact-finding hearing and forego a substantial benefit of its bargain.

[14] We hold that defendant is bound by the terms of the plea agreement, *see Alexander*, 869 F.2d at 94, in which he unambiguously forfeited all of his property. The district court's extraneous statements that defendant was only forfeiting assets listed in the CCE count of the indictment or from his drug trade do not establish that defendant did not knowingly and voluntarily forfeit all of his property. Rather, defendant agreed to forfeit all of his assets, including some that on their face had no connection with his drug dealings—*e.g.*, "all bank accounts, investments, retirement accounts," I R. tab 210 at 3. Nothing in the agreement limits the forfeiture to those assets with an established factual basis for forfeiture. Defendant is also not limited to forfeiting only those assets directly related to the CCE conviction. Accordingly, the district court properly ordered on December 23, 1992, the forfeiture of all of defendant's assets[8] based on defendant's written agreement and knowing and voluntary ratification of that agreement at the change of plea hearing.

III

Defendant argues that he was not advised of and did not waive his right to a jury trial on forfeiture issues. Specifically, defendant contends he did not sign a written waiver of his right to a jury trial and there was no colloquy with the court during the plea or sentencing hearing regarding his right to or waiver of a trial on forfeitability of assets.

[15, 16] "The Sixth Amendment never has been thought to guarantee a right to a jury determination [on punishment]." *Spariano v. Florida*, 468 U.S. 447, 459, 104 S.Ct. 3154, 3161, 82 L.Ed.2d 340 (1984) (right to jury trial does not include right to jury determination whether to impose capital sentence). This suggests that defendant does not have a *constitutional* right to a jury trial at the forfeiture stage of these proceedings; the circuits, however, would apparently split on the issue of a constitutional right to a jury trial on forfeiture. *Compare United States v. Robinson*, 8 F.3d 418, 420 (7th Cir.1993) (noting in dicta that a defendant does not have a constitutional right to a jury determination on forfeiture issues, but acknowledging the right to such a determination under Fed.R.Crim.P. 31(e)) *with United States v. Garrett*, 727 F.2d 1003, 1012 & n. 6 (11th Cir.1984) (holding that a defendant has a constitutional right to a jury trial in a 21 U.S.C. § 848 proceeding to determine if an asset is forfeitable, after a jury trial as to guilt), *affirmed on other grounds*, 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985). We need not decide that issue because constitutional rights can be waived, and because a defendant does have a *statutory* right, pursuant to Fed.R.Crim.P. 31(e),[9] to have a jury determine which of his assets may be forfeited. *Robinson*, 8 F.3d at 420. Thus, we must determine whether defendant waived his right to a jury trial. "[A] defendant's waiver of his statutory right to have a jury determine which portion of his property is subject to forfeiture is only valid if knowingly and voluntarily made." *Id.* at 421. A defendant has the burden of proving that he did not exercise a valid waiver of his right. *Id.* at 422.

[17, 18] A valid waiver of the right to a jury trial depends on unique facts of each case. *See id.* At the plea hearing, the district court advised defendant that he could

8. Of course, defendant could only agree to forfeit assets over which he had a power of disposition. Thus, if he had an interest in a profit sharing or pension plan established by his corporate employer that was inalienable by law, or if he was beneficiary of a valid spendthrift trust created by another person, these interests would be excluded from forfeiture in the same manner as assets in defendant's possession owned by a third party.

9. Rule 31(e) provides that "[i]f the indictment ... alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any."

continue with the jury trial that had already started. The district court told defendant that if he pleaded guilty pursuant to the plea agreement, he would give up his right to a jury trial and would be sentenced. Defendant stated that he understood his rights and chose to plead guilty. *Cf. United States v. Jenkins*, 904 F.2d 549, 558–59 (10th Cir.) (at trial, defendant and his counsel have responsibility to make trial court aware of desire to testify regarding forfeiture; if no request is made, court and government can assume that evidence of guilt and forfeiture may be heard together), *cert. denied*, 498 U.S. 962, 111 S.Ct. 395, 112 L.Ed.2d 404 (1990). The district court did not specifically indicate that defendant's guilty plea negated a jury trial on any forfeiture issues. But there is no evidence at that hearing that defendant wanted a jury trial on the forfeiture issue, or thought he was going to have one. The plea agreement itself waived the right to a jury trial without specific mention of forfeiture. There is no evidence in the record that the government would have agreed to a plea agreement that settled only guilt and required a jury trial on the assets to be forfeited. We hold that specific reference to a jury trial on forfeiture issues was not necessary in light of the unambiguous plea agreement and defendant's knowing and voluntary plea. Under these circumstances we conclude defendant waived his right to a jury trial.

IV

[19] Defendant finally argues that even if all of his assets were correctly forfeited the forfeiture order violates the Excessive Fines Clause of the Eighth Amendment. The Supreme Court has determined that forfeiture may be analyzed under the Excessive Fines Clause. *Alexander v. United States*, — U.S. —, —, 113 S.Ct. 2766, 2776, 125 L.Ed.2d 441 (1993) (criminal forfeiture under 18 U.S.C. § 1963(a)); *see also United States v. Bieri*, 21 F.3d 819, 823 n. 2 (8th Cir.1994) (excessive fines analysis applies to criminal forfeiture under § 853(a)). The Court, however, has not established a test to determine when a forfeiture is excessive. *Alexander*, — U.S. at —, 113 S.Ct. at 2776; *Austin v. United States*, — U.S. —, —, 113 S.Ct. 2801, 2812, 125 L.Ed.2d 488 (1993). Rather, courts must consider all factors when evaluating whether a forfeiture is unconstitutionally excessive. *Bieri*, 21 F.3d at 824 (citing *Alexander*, — U.S. at —, 113 S.Ct. at 2776).

[20] We need not decide when a forfeiture might violate the Excessive Fines Clause, because the forfeiture in this case was not excessive. *See United States v. Certain Real Property & Premises Known as 38 Whalers Cove Drive, Babylon, NY*, 954 F.2d 29, 39 (2d Cir.) (civil forfeiture), *cert. denied*, — U.S. —, 113 S.Ct. 55, 121 L.Ed.2d 24 (1992). A fine of up to $2,000,000 and forfeiture are permitted for a CCE offense. 21 U.S.C. § 848(a); U.S.S.G. § 5E1.2(c)(3), (4). Defendant was fined only $5,000. The plea agreement stated that property up to $1,500,000 could be forfeited; yet the actual value of the property forfeited was only $410,000. The forfeiture order did not violate the Excessive Fines Clause of the Eighth Amendment.

V

Defendant raises several other arguments in his pro se briefs, mostly related to the issues determined above. These arguments are not sufficiently meritorious to warrant their being specifically addressed.

The order of forfeiture is AFFIRMED. The government's motion to dismiss is DENIED. Defendant's motion for limited remand is DENIED as moot.

KEY NUMBER SYSTEM

UNITED STATES of America,
Plaintiff-Appellee,
v.
Martha LIRA-ARREDONDO,
Isaac Guzman-Hernandez,
Defendants-Appellants.
Nos. 94-1006, 94-1007.

United States Court of Appeals,
Tenth Circuit.

Oct. 25, 1994.

Two defendants were convicted in the United States District Court for the District

ORIGINAL (3)

No. 94-7427

Supreme Court, U.S.
FILED
FEB 22 1995
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOSEPH V. LIBRETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

RECEIVED
HAND DELIVERED
FEB 22 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. Whether petitioner's guilty plea, entered pursuant to a plea agreement calling for forfeiture of certain assets, satisfied the requirements of Fed. R. Crim. P. 11(f).

2. Whether petitioner waived his right to a jury trial.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-7427

JOSEPH V. LIBRETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 523-531) is reported at 38 F.3d 523.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1994. The petition for a writ of certiorari was filed on December 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering a guilty plea in the United States District Court for the District of Wyoming, petitioner was convicted of engaging in a continuing criminal enterprise, in violation of 21

U.S.C. 848. He was sentenced to 20 years' imprisonment, to be followed by five years of supervised release, and fined $5,000. He was also ordered to forfeit certain specified property. The court of appeals affirmed. Pet. App. 523-531.

1. Petitioner was charged, in an eleven-count superseding indictment, with drug and money laundering offenses stemming from his ongoing conspiracy to distribute cocaine and marijuana. Superseding Indictment 1-39. Count 6 of the indictment charged that petitioner had participated in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848. Petitioner's participation in the CCE charged in Count 6 was described in 26 paragraphs of specific allegations. Superseding Indictment 22-31. Count 6 also specified certain real property, conveyances, cash proceeds, currency and jewelry, and other assets that were to be forfeited because they were either "derived from proceeds [petitioner] obtained" from his CCE, or were "used and intended for use * * * to commit or to facilitate the commission" of the CCE offense. Id. at 31-32; see 21 U.S.C. 853(a)(1)-(2).[1]

2. At the end of the first week of his jury trial on the charges in the indictment, petitioner entered into a plea agreement with the government. The agreement provided that petitioner would "waive[] various constitutional rights, including the right to a

[1] The indictment identified the real property to be forfeited by lot number; the vehicles to be forfeited by color, year, make, model, and vehicle identification number; the computer and printer to be forfeited by make, model, and serial numbers; and the cash to be forfeited by amount and by its location when discovered (e.g., "inside a paint can" at petitioner's house). Superseding Indictment 32-33.

jury trial," and plead guilty to the CCE charge in Count 6. Plea Agreement 2. Petitioner was advised that "[t]he maximum statutory penalty for the offense" included "forfeiture of all known assets as prescribed in 21 U.S.C. § 853 and assets which are discovered at any later time up to $1,500,000." Ibid. The agreement specifically provided that petitioner would "transfer his right, title, and interest in all of his assets to the Division of Criminal Investigation of the Wyoming Attorney General including, but not limited to: all real estate; all personal property, including guns, the computer, and every other item now in the possession of the United States; all bank accounts, investments, retirement accounts, cash, cashier's checks, travelers checks and funds of any kind." Id. at 3. In exchange, the government agreed to dismiss the remaining charges in the indictment, not to file any additional charges against petitioner arising from his known activity, and to recommend the mandatory minimum sentence of 20 years' imprisonment. Id. at 3; 10/5/92 Change of Plea Tr. 4.

At the change of plea hearing, the district court advised petitioner of his rights, including his "right to a speedy and public jury trial, which we're in the middle of." 10/5/92 Change of Plea Tr. 5. The court explained to petitioner that if he pleaded guilty, "it's going to be the end of this trial," and "the jury is not going to decide whether you're guilty or not." Id. at 6. The court also explained "the consequences of [petitioner's] plea," including "a minimum sentence of 20 years," a maximum sentence of life imprisonment, and the fact that "all the property

that's described in this Count 6 could be forfeited to the United States." Id. at 7.

The court asked petitioner whether he understood the consequences of his plea, and petitioner stated: "There is only one part I didn't understand. They said that they can take up to one and a half million dollars from me at any time. Let's say 20 years from now I get a job, I get a paycheck. They can come and take that?" 10/5/92 Change of Plea Tr. 7-8. After consulting with petitioner's attorney, the court explained that the forfeiture was limited to tainted assets, and that petitioner's future legitimate income would not be forfeit. Id. at 8-9.

The court then explained to petitioner that "I will have to question you as to whether or not your guilty plea is a voluntary plea and whether or not there's a factual basis for the plea." 10/5/92 Change of Plea Tr. 9. The court read aloud the 26 paragraphs of Count 6 of the indictment. Id. at 10-18. The court also read aloud the allegations in Count 6 specifying the property to be forfeited by petitioner (id. at 18-19):

> And then under the topic Forfeiture, it alleges that upon conviction of the defendant for engaging in a continuing criminal enterprise, the United States is entitled to forfeiture of all property of any kind constituting or derived from proceeds [petitioner] obtained directly and indirectly by engaging in said continuing criminal enterprise; all property of any kind which was used or intended for use in any manner or part to commit or to facilitate the commission of this criminal -- continuing criminal enterprise, including but not limited to the following, and then there is listed real property, your lot in Star Valley, conveyances of two vehicles, cash proceeds over a hundred thousand dollars and then another $12,000 and a five -- 5,100 and 7,600 amount in currency and jewelry and property consisting of a mobile home and a computer system, bank

> accounts that are listed in the Indictment, investments that are listed in the Indictment, the additional cashier's checks and the contents of safe deposit boxes, and that's it.

After confirming under oath that he understood the indictment and the plea agreement, and specifically that he understood "that all of [his] property could be forfeited," petitioner pleaded guilty to Count 6. 10/5/92 Change of Plea Tr. 19-21. He explained that he was pleading guilty, as the district court summarized (id. at 22), because "the testimony that you heard in this courtroom last week was so overwhelming that you feel you have no defense to it." Petitioner also confirmed that he was pleading guilty in part to "spare" his parents and brother from testifying that "this property that's listed here isn't -- wasn't acquired from them by way of gift." Id. at 23. At the end of the hearing, the district court accepted the plea, explaining (id. at 43): "The Court finds that the plea of guilty is a voluntary plea and the Court further finds that there is a factual basis for the guilty plea."

Two and one-half months later, at petitioner's sentencing hearing, the court stated that it would enter an order of forfeiture consistent with the plea agreement. 12/23/92 Sent. Tr. 20-21. At the end of the hearing, petitioner asked, "Are we over?" The court answered, "I think so," and petitioner stated: "Well, then, with that in mind, I would just like to object to what I see as a failure to find any factual basis for the whole forfeiture, just for the record." Id. at 25. The court "noted the objection, but determined that there was sufficient evidence to warrant granting forfeiture." Pet. App. 526.

3. On December 23, 1992, the court ordered forfeiture of 40 pieces of property, including land, vehicles, cash, machineguns, bank accounts, cashier's checks, and travelers checks. Order of Forfeiture 2-8. Petitioner filed a notice of appeal from that order on December 29, 1992. Gov't C.A. Br. 10.[2]

On April 2, 1993, while the case was pending before the court of appeals, the district court modified its earlier forfeiture order, determining "that it may be unjust to enforce the specific forfeiture provisions in the plea agreement." Order Amending December 23, 1992, Forfeiture Order 13. The court explained that "a defendant's concession in a plea agreement to the forfeiture of his property does not make it so," and ordered "the Magistrate [to] conduct a fact finding hearing in which [petitioner] is given an opportunity to show by a preponderance of the evidence that his property is not subject to forfeiture." Id. at 13-14 (internal quotation and citation omitted).[3] On June 7, 1993, the district court granted the government's motion to stay proceedings before the magistrate judge pending the disposition of petitioner's appeal. Gov't C.A. Br. 12.

4. a. The court of appeals affirmed. Petitioner argued that the district court had violated Fed. R. Crim. P. 11(f) by failing to satisfy itself that there was a factual basis for the

[2] On December 30, 1992, petitioner filed an additional notice of appeal from the $5,000 fine. Gov't C.A. Br. 10.

[3] The court also recognized various third parties' interests in some of the forfeited property. Order Amending December 23, 1992, Forfeiture Order 14-16; see 21 U.S.C. 853(n)(6)(A)-(B).

forfeiture. The court rejected that argument based on petitioner's concession that "criminal forfeiture * * * is a part of the sentence, not a part of the substantive offense." Pet. App. 528; see id. at 527 (petitioner "concedes" that "forfeiture is part of the criminal sentence"). The court held "'that a sentencing judge is not required under Rule 11 to determine whether there is a factual basis for a defendant's concession to a criminal forfeiture pursuant to his plea bargain with the government,'" because "Rule 11(f) only applies to the guilty plea," not to the sentence imposed pursuant to that plea. Id. at 528 (quoting United States v. Boatner, 966 F.2d 1575, 1581 (11th Cir. 1992)).

b. The court also rejected petitioner's argument that he had been deprived of his right to a jury trial on the forfeiture. The court stated that it "need not decide" whether petitioner possessed a constitutional right to a jury trial on forfeiture[4] "because constitutional rights can be waived, and because a defendant does have a statutory right, pursuant to Fed.R.Crim.P. 31(e), to have a jury determine which of his assets may be forfeited. Thus, we must determine whether [petitioner] waived his right to a jury trial." Pet. App. 530. The court examined the record (see id. at 530-531) and concluded that petitioner had waived his right to a jury trial on the issue of forfeiture. Id. at 531.

[4] The court did note, however, that the absence of a Sixth Amendment right to have one's punishment determined by a jury "suggests that [petitioner] does not have a constitutional right to a jury trial at the forfeiture stage of these proceedings." Pet. App. 530.

ARGUMENT

Petitioner contends (Pet. 7) that this Court should grant review to resolve conflicts among the courts of appeals on two questions: first, whether Fed. R. Crim. P. 11(f) requires a district court to determine that a "factual basis" exists for a criminal forfeiture that is stipulated in a plea agreement; and second, whether a defendant has a constitutional right to a jury trial on a criminal forfeiture.

1. a. The court of appeals correctly determined that Rule 11(f) does not require a district court to find a factual basis for a criminal forfeiture. Rule 11(f) provides that the court should not enter judgment on a guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea." By focusing on the factual basis for the plea itself, rather than on the consequences of the plea, Rule 11(f) is designed to ensure only "that the conduct which the defendant admits constitutes the offense charged," in order to "protect a defendant who is in the position of pleading voluntarily * * * without realizing that his conduct does not actually fall within the charge." Advisory Committee's Notes to Fed. R. Crim. P. 11 (1966); see United States v. LeDonne, 21 F.3d 1418, 1424 (7th Cir.), cert. denied, 115 S. Ct. 584 (1994); United States v. DeFusco, 949 F.2d 114, 120 (4th Cir. 1991), cert. denied, 112 S. Ct. 1703 (1992). Thus, as the courts of appeals have recognized, the Rule does not require a factual basis for the defendant's sentence, but only for his conviction. See United States v. Reyes, 13 F.3d 638, 640 (2d Cir. 1994) (no

need for factual basis on type and quantity of controlled substance defendant conspired to import because those facts not elements of the crime, but only sentencing factors); see also United States v. Allen, 804 F.2d 244, 245 (3d Cir. 1986), cert. denied, 480 U.S. 922 (1987); United States v. Adams, 961 F.2d 505, 508 (5th Cir. 1992) (per curiam); United States v. Morrow, 914 F.2d 608, 612-613 (4th Cir. 1990); United States v. Goldberg, 862 F.2d 101, 104 (6th Cir. 1988); United States v. Rivera-Ramirez, 715 F.2d 453, 457 (9th Cir. 1983), cert. denied, 467 U.S. 1215 (1984).

As petitioner conceded below (see Pet. App. 527, 528), criminal forfeiture is a penalty, not an offense. See Alexander v. United States, 113 S. Ct. 2766, 2775 (1993) ("The in personam criminal forfeiture [under RICO] is clearly a form of monetary punishment"[5]); United States v. Robinson, 8 F.3d 418, 420 (7th Cir. 1993); United States v. Simone, 931 F.2d 1186, 1199 (7th Cir.), cert. denied, 502 U.S. 981 (1991). As the court explained in United States v. Bissell, 866 F.2d 1343, 1348 n.3 (11th Cir. 1989), "criminal forfeiture operates in personam against the defendant, serving as a penalty upon conviction" for an underlying crime, and is therefore different from civil forfeiture, which "operates in rem against the property itself under the theory that the property

---

[5] The forfeiture provisions applicable to violations of the CCE statute, 21 U.S.C. 853, and those applicable to violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1963(a), have been construed identically. See, e.g., Pet. App. 528 n.6; United States v. Bissell, 866 F.2d 1343, 1348 n.3 (11th Cir. 1989); In re Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 640 (4th Cir. 1988) (en banc), aff'd, 491 U.S. 617 (1989).

is guilty of wrong-doing." See In re Billman, 915 F.2d 916, 920 (4th Cir. 1990), cert. denied, 500 U.S. 952 (1991).[6]

Thus, the forfeiture provisions in petitioner's plea agreement were not subject to the requirements of Rule 11(f). As a penalty, the forfeiture in this case formed no part of petitioner's "plea," and therefore need not have been supported by a factual basis pursuant to the Rule. As the Eleventh Circuit explained in United States v. Boatner, 966 F.2d 1575, 1581 (11th Cir. 1992) (citations omitted),

> forfeiture is a consequence of a defendant's drug activity rather than a determination of his culpability. Consequently, a forfeiture provision in a Rule 11 agreement is not a plea to a substantive charge, but a sanction to which the parties agree as a result of the defendant's plea. Because Rule 11(f) is applicable only to guilty pleas, * * * a sentencing judge is not required under Rule 11 to determine whether there is a factual basis for a defendant's concession to a criminal forfeiture pursuant to his plea bargain with the government.

b. Petitioner is correct that the courts of appeals are divided on this question. See Pet. App. 527-528 ("Four circuits have considered this issue and have reached divergent conclusions"). The Fourth and Seventh Circuits have held that Rule 11(f) requires the district court to determine a factual basis for

---

[6] The statutes underlying petitioner's conviction and sentence in this case specifically provide that criminal forfeiture is part of a defendant's sentence, not part of his crime. Under 21 U.S.C. 848, a person who engages in a CCE "shall be sentenced to a term of imprisonment * * * to a fine * * * and to the forfeiture prescribed in section 853 of this title." Section 853, in turn, provides that "[t]he court, in imposing sentence on [a person convicted of a CCE] shall order, in addition to any other sentence * * * that the person forfeit to the United States all property described in this subsection."

a forfeiture. See United States v. Reckmeyer, 786 F.2d 1216, 1222 (4th Cir.) (Rule 11(f) "requires the district court to inquire beyond the [plea] agreement to determine if there is a factual basis for the forfeiture of the assets"), cert. denied, 479 U.S. 850 (1986); United States v. Roberts, 749 F.2d 404, 409-410 (7th Cir. 1984), cert. denied, 470 U.S. 1058 (1985); United States v. De Ortiz, 910 F.2d 376, 384 (7th Cir. 1990) (Rule 11(f) "requires that the district court inquire into the factual basis for the plea, including the agreement to forfeit assets"). The Fifth Circuit has held that "the requirement of Rule 11(f) that the factual basis for a plea be established at the plea hearing does not apply to an order of forfeiture," but that "we will uphold the district court's order of forfeiture if the entire record which was before the court provided a factual basis for the forfeiture." United States v. Bachynsky, 949 F.2d 722, 730 (5th Cir. 1991) (internal quotation marks omitted), cert. denied, 113 S. Ct. 150 (1992).[7] Like the Tenth Circuit in the instant case, the Eleventh Circuit has "conclude[d] that neither Reckmeyer nor Roberts is persuasive" and has held that "a sentencing judge is not required under Rule 11 to

---

[7] In Bachynsky, the Fifth Circuit suggested that Rule 11(f) ordinarily requires findings to be made "at the plea hearing." See United States v. Crumbley, 872 F.2d 975, 976-977 (11th Cir. 1989), cited in Bachynsky, 949 F.2d at 730. That is incorrect. The Rule contemplates "acceptance of a plea of guilty" without a factual basis, and provides only that the "the court should not enter judgment upon such plea" without being satisfied that it is supported by a factual basis. The Advisory Committee's Notes to the Rule confirm that the court may look beyond the plea hearing itself in finding the factual basis for the plea. See, e.g., United States v. Adams, 961 F.2d 505, 508-509 & n.3 (5th Cir. 1992).

determine whether there is a factual basis for a defendant's concession to a criminal forfeiture pursuant to his plea bargain with the government." United States v. Boatner, 966 F.2d 1575, 1581 (11th Cir. 1992); see Pet. App. 528 ("We agree with the holding and reasoning in Boatner").

The instant case, however, provides an inappropriate vehicle for resolution of the circuit conflict.* Even under the more stringent standard applicable in the Fourth and Seventh Circuits, Rule 11(f) was satisfied with respect to petitioner's forfeiture in this case. The factual basis required by Rule 11(f) may be found in "anything that appears on the record," United States v. Lumpkins, 845 F.2d 1444, 1450 (7th Cir. 1988) (internal quotation marks omitted), including "the information and the plea hearing," or the "Presentence Report," United States v. Adams, 961 F.2d 505,

---

* As the court below noted (Pet. App. 528-529), moreover, the conflict on the issue may well be receding. The Seventh Circuit has recognized that "[f]orfeiture is not an element of the offense but only punishment for an offense upon which a conviction has already been entered," United States v. Simone, 931 F.2d 1186, 1199 (7th Cir.) (internal quotation marks omitted), cert. denied, 502 U.S. 981 (1991), and as the court below suggested (Pet. App. 528), the Seventh Circuit may not "continue to apply the holding in Roberts in light of" that recognition. But see De Ortiz, 910 F.2d at 383-384. The Fourth Circuit has also recently recognized that forfeiture is punishment. Compare In re Billman, 915 F.2d 916, 920 (4th Cir. 1990) (RICO forfeiture is "an in personam proceeding against the defendant, and the forfeiture constitutes partial punishment for the offense"), cert. denied, 500 U.S. 952 (1991), with In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637, 644-645 (4th Cir. 1988) (en banc) (Forfeiture under 21 U.S.C. 853 "is not an attempt to punish," but "is an assertion that the defendant does not have the * * * assets"), aff'd, 491 U.S. 617 (1989). The Fifth Circuit's decision in Bachynsky relied on the Eleventh Circuit's earlier decision in United States v. Crumbley, 872 F.2d 975 (1989), which was later effectively overruled in Boatner, 966 F.2d at 1581; see Pet. App. 528 n.7.

508-509 & n.3 (5th Cir. 1992). See Advisory Committee's Notes to Fed. R. Crim. P. 11 (1974) ("An inquiry might be made of the defendant, of the attorneys for the government and the defense, of the presentence report when one is available, or by whatever means is appropriate in a specific case."); Santobello v. New York, 404 U.S. 257, 261 (1971); Bachynsky, 949 F.2d at 730; United States v. Allen, 804 F.2d 244, 245 (3d Cir. 1986), cert. denied, 480 U.S. 922 (1987); United States v. Rivera-Ramirez, 715 F.2d 453, 457 (9th Cir. 1983), cert. denied, 467 U.S. 1215 (1984). Thus, in Reckmeyer, the Fourth Circuit upheld the forfeiture based on "the plea agreement," the government's "statement of facts" at the change of plea hearing, and "the forfeiture [as] pled in the indictment." 786 F.2d at 1222. In Roberts, the Seventh Circuit upheld the forfeiture "[o]n the basis of concessions made in the plea agreement." 749 F.2d at 410. Other Seventh Circuit decisions endorse reliance on the entire record. Lumpkins, 845 F.2d at 1450.

The record in this case provided an ample factual basis for petitioner's forfeiture. Petitioner's plea agreement expressly provided for forfeiture and specified the assets to be forfeited. Plea Agreement 2-3. Count 6 of the indictment also specified the property to be forfeited and explained why the property was forfeitable under the standards of 21 U.S.C. 853. Superseding Indictment 31-32. At the change of plea hearing, the court specifically advised petitioner that "all the property that's described in Count 6 could be forfeited to the United States," and read aloud the allegations in Count 6 specifying the property to be

forfeited. 10/5/92 Change of Plea Tr. 7, 18-19. Petitioner himself explained that he was pleading guilty due to the government's "overwhelming" evidence against him, id. at 22, and to "spare" his parents and brother from testifying that "this property that's listed here isn't -- wasn't acquired from them by way of gift," id. at 23. Two months later, when petitioner lodged a pro forma objection to the adequacy of the factual basis underlying the forfeiture, 12/23/92 Sent. Tr. 25, the court "noted the objection, but determined that there was sufficient evidence to warrant granting forfeiture." Pet. App. 526. The Presentence Report (PSR) detailed the connections between petitioner's CCE and the forfeited property. See PSR ¶¶ 6, 8-9, 11-12, 18, 25, 27-28, 38.[9] Based on

[9] The court did later determine "that it may be unjust to enforce the specific forfeiture provisions in the plea agreement." Order Amending December 23, 1992, Forfeiture Order 12. That determination, however, was made (and was based on motions that were filed) long after judgment was entered, and after petitioner filed his notice of appeal. See Pet. App. 526. Although the court has the authority to adjudicate third-party interests in forfeited property after entering the judgment of forfeiture, that authority does not extend to the defendant's own interest. See 21 U.S.C. 853(n)(2) (covering petitions filed by "[a]ny person, other than the defendant"); Pet. App. 527. Neither Rule 35 nor Rule 36 of the Federal Rules of Criminal Procedure authorized the court's actions. See, e.g., Scott v. United States, 997 F.2d 340, 341 (7th Cir. 1993) (Rule 35); United States v. Dadino, 5 F.3d 262, 264 (7th Cir. 1993) (Rule 36). In any event, once petitioner filed his notice of appeal from the forfeiture order -- before the filing of and decision on his motions to reconsider the forfeiture order -- the district court was without jurisdiction over that aspect of the case. See Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 59-61 (1982); Pet. App. 526-527.

that record, petitioner would not be entitled to relief under any standard. Further review is not warranted.[10]

2. Petitioner also alleges (Pet. 7) that the courts of appeals are divided over whether a defendant has a constitutional right to a jury determination of forfeiture. Even if there were a conflict on that question,[11] this case does not squarely present it. The court of appeals in this case stated that it "need not decide" the constitutional question "because constitutional rights can be waived, and because a defendant does have a statutory right, pursuant to Fed.R.Crim.P. 31(e), to have a jury determine which of his assets may be forfeited. Thus, we must determine whether [petitioner] waived his right to a jury trial." Pet. App. 530. The court examined the record (see id. at 530-531) and concluded that petitioner had waived his right to a jury trial on the issue

[10] Indeed, even if petitioner were correct that Rule 11(f) was violated in this case, he would not be entitled to relief. Rule 11(h) specifically provides that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." As discussed in the text, the court found ample facts prior to entering its order of forfeiture. Thus, any error under Rule 11(f) should be "disregarded."

[11] In fact, there is no square conflict on this issue. In United States v. Garrett, 727 F.2d 1003, 1012 & n.6 (1984), aff'd on other grounds, 471 U.S. 773 (1985), the Eleventh Circuit held that a defendant has a constitutional right to a jury determination of a criminal forfeiture. In United States v. Robinson, 8 F.3d 418, 420 (1993), the Seventh Circuit stated its "belie[f]" that no such constitutional right exists, but declined to "provide a definitive answer to this question today." The court below took a similar approach. It stated that the absence of any Sixth Amendment right to have one's punishment determined by a jury "suggests that [petitioner] does not have a constitutional right to a jury trial at the forfeiture stage of these proceedings," while ultimately concluding that "we need not decide that issue," Pet. App. 530, because there was in any event a valid waiver of whatever jury trial rights petitioner did possess, id. at 531.

of forfeiture. Id. at 531. The court's factbound determination regarding the adequacy of petitioner's waiver does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

FEBRUARY 1995

Supreme Court, U.S.
FILED
FEB 22 1995
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RECEIVED
HAND DELIVERED
FEB 23 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOSEPH V. LIBRETTI
PETITIONER

V. NO. 94-7427

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, by first-class mail, postage prepaid, this 22nd day of February, 1995.

JENINE JENSEN
ASSISTANT FEDERAL PUBLIC DEFENDER
1099 18TH STREET
PLAZA TOWER, #300
DENVER, CO 80202

Drew S. Days, III

DREW S. DAYS, III
Solicitor General

February 22, 1995

ORIGINAL

No. 94-7427

RECEIVED
MAR 28 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Supreme Court, U.S.
FILED
MAR 27 1995
OFFICE OF THE CLERK

Joseph V. Libretti, Jr.,

Petitioner

v.

United States of America,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

Joseph V. Libretti, Jr., pro se

F.C.I. Phoenix

37910 N. 45th Avenue

Phoenix, Az. 85027

STATEMENT OF AUTHORITIES

Whalen v. United States, 445 U.S. 684,
63 L.Ed.2d 715, 100 S.Ct. 1432 (1980) 9

United States v. Libretti, 38 F. 3d 523,
(10th Cir. 1994) 7

I. RESPONDENT ERRED IN CLAIMING THAT THE RECORD IN THIS CASE PROVIDED AN AMPLE FACTUAL BASIS FOR THE PETITIONER'S FORFEITURE

At pages 13-14, Respondent's Brief For The United States In Opposition,[1] Respondent so stated,

> "The record in this case provided an ample factual basis for petitioner's forfeiture. Petitioner's plea agreement expressly provided for forfeiture and specified the assets to be forfeited. Plea agreement 2-3. Count 6 of the indictment also specified the property to be forfeited and explained why the property was forfeitable under 21 U.S.C. 853. Superseding Indictment 31-32. At the change of plea hearing, the court specifically advised petitioner that 'all the property that's described in Count 6 could be forfeited to the United States,' and read aloud the allegations in Count 6 specifying the property to be forfeited."

Respondent then asserts, id. at 14-15, that based on this record, petitioner would not be entitled to relief under any standard, and therefore, further review is not warranted.

Because Respondent's claims are based on an erroneous factual basis concerning the assets listed in Count 6 of the indictment and the assets included in the Order of Forfeiture, Respondent's conclusion that the record in this case provided an ample basis for petitioner's forfeiture is erroneous.

---

[1] Hereinafter RB or "Respondent's Brief."

A. Because a majority of the property included in the Order of Forfeiture was not specified or identified in Count 6 of the Indictment as property to be forfeited, Respondent's reliance on the Indictment as establishing the factual basis for the forfeiture of all of the property in the Order of Forfeiture is erroneous.

Respondent perpetuates the misconception throughout Respondent's Brief that all of the property included in the Order of Forfeiture was "specifically" listed in the indictment, under Count 6, as Rule 7(c)(2) Fed.R.Crim.P. mandates. For example, Respondent claims at page 2, id., that Count 6 specified the property to be forfeited, and then at footnote 1, id., Respondent goes on to claim that all the property was identified by description. Respondent also states, id. at 13, "Count 6 of the indictment also specified the property to be forfeited and explained why the property was forfeitable under the standards of 21 U.S.C. 853."

Despite Respondent's assertions to the contrary, a vast majority of the property included in the Order of Forfeiture was not "specified" in Count 6 of the indictment, as property to be forfeited, as Rule 7(c)(2) Fed.R.Crim.P. requires, and no explanation as to "why [this unspecified property] was forfeitable under the standards of 21 U.S.C. 853" can be found in Count 6 of the indictment. The majority of the property included in the Order of Forfeiture was not property subject to forfeiture "under the standards of 21 U.S.C. 853," and nothing in the record supports any claim to the contrary.

First, two items of real property, identified as two condominiums in items (B) and (C) of the Order of Forfeiture, were forfeited. These condominiums were neither identified in the indictment, nor were these properties subject to forfeiture under §853. Respondent misstates this fact at page 2, and at page 2 n. 1, when Respondent assumes this real property was "specified" in Count 6 of the indictment.

Second, two childhood bank accounts, which Petitioner was unaware of the existence of when he pled guilty, items (U) and (V), were also neither "specified" in Count 6 of the indictment, nor property subject to forfeiture. Again, Respondent misstates facts in assuming, and then implying throughout Respondent's Brief, that all of the property forfeited was "specified" in the indictment.

Third, Petitioner's employee payroll savings plan, item (NN) in the Order of Forfeiture, was neither "specified" in the indictment, nor property subject to forfeiture as described in §853. This employee payroll savings plan consisted entirely of employer deductions from Petitioner's paychecks he earned as an accounting supervisor at General Chemical Corporation. It is worth noting that this asset was included in the Order of Forfeiture as substitute assets under §853(p), and not, as Respondent has stated at page 2 RB, "derived from proceeds [petitioner] obtained" or were "used and intended for use * * * to commit or to facilitate the commission" of the CCE offense.

Fourth, Petitioner's legal firearms business inventory, and personal firearms collection, (items I-P and ¶2 Order of

Forfeiture), were neither "specified" in the indictment, nor subject to forfeiture under § 853. Respondent assumes throughout Respondent's Brief that such property was alleged in the indictment as property subject to forfeiture, in accordance with Rule 7(c)(2) Fed.R.Crim.P., but such is not so.

Because Petitioner's condominiums, employee payroll savings plan, childhood bank accounts, and legitimately owned and acquired firearms business inventory, and personal firearms collection, were not specified as property subject to forfeiture in Count 6 of the indictment, or listed anywhere in the indictment, Respondent's claims that the indictment "specified the property to be forfeited and explained why the property was forfeitable under the standards of 21 U.S.C. 853" are erroneous, and must fail. A fortiori, Respondent's assertion that "the record in this case provided an ample factual basis for petitioner's forfeiture" must also fail, because this assertion is premised on the erroneous assumption that all of the property included in the Order of Forfeiture was specified in the indictment.

For the reasons stated above, Respondent's reliance on the indictment, and the District Court's Rule 11 advisement, as providing "an ample factual basis" for petitioner's forfeiture is error.

B. Because the District Court's advisement regarding the property subject to forfeiture did not include all of the property included in the Order of Forfeiture, Respondent's reliance on the District Court's advisement, as establishing the factual basis for Petitioner's forfeiture, is erroneous.

As stated above, a vast majority of the property ultimately included in the Order of Forfeiture was neither "specified" in the indictment as assets to be forfeited, nor as property described as subject to forfeiture under § 853. Throughout Respondent's Brief Respondent repeatedly asserts, incorrectly, that the District Court's Rule 11 advisement advised petitioner "that all of his property could be forfeited," id. at 5, and that petitioner understood "that all of his property could be forfeited." A review of the record establishes that petitioner was advised, and understood, that only property "that's described in Count 6 could be forfeited," 10/5/92 Change of Plea Tr. 7, 18-19, and RB., 13-14, and then only if that property was owned by petitioner "by reason of any drug transaction," Change of Plea Tr. at 21.

When the District Court read aloud the allegations in Count 6 specifying the property alleged to be subject to forfeiture, Change of Plea Tr. at 18-19, the District Court recited the list of property in Count 6, and informed Petitioner that no other property could be forfeited, by saying "and that's it." Because the District Court's advisement as to what property could be forfeited did not include petitioner's condominiums, childhood

bank accounts, employee payroll savings plan, or firearms business inventory or personal firearms collection, Respondent's reliance on the District Court's advisement as providing "an ample factual basis" for petitioner's forfeiture is error.

C. Neither the indictment, nor the record, provided a factual basis for the forfeiture of substitute assets under §853(p)

Item (NN) in the Order of Forfeiture is Petitioner's employee payroll savings plan. The Order of Forfeiture states that this asset was "to be forfeited as substitute assets for assets dissipated and otherwise expended by Libretti." Order of Forfeiture at page 7. Substitute assets forfeited under §853(p) are, by definition, not property subject to forfeiture under §853(a).

As stated above, petitioner's employee payroll savings plan was not "specified" in Count 6 of the indictment, nor did Count 6 explain "why the property was forfeitable under the standards of 21 U.S.C. § 853." RB at 13. Furthermore, Count 6 did not specify that this asset was to be forfeited because it was "either derived from proceeds [petitioner] obtained" from his CCE, or were "used and intended for use * * * to commit or facilitate the commission" of the CCE offense. By virtue of the employee payroll savings plan's status as substitute assets, it is conceded that this asset was not derived from, or used or intended to be used, to facilitate the offense.

Nothing in either the indictment or the record provides a factual basis for the forfeiture of substitute assets under 853(p). No assets were ever identified as tainted property as described in § 853(a), yet unavailable for forfeiture "as a result of any act or omission of the defendant." The District Court made a similar factual finding in its April 2, 1993 ORDER AMENDING DECEMBER 23, 1992 FORFEITURE ORDER, pages 6-7, n. 1, after analyzing the issue of substitute assets in this case.

> "However, the government has not met its burden of proof that property subject to forfeiture pursuant to §853(p) falls into one of the five categories listed above, and that substitute assets should be forfeited in lieu of these assets."

In the Tenth Circuit's ruling, the Tenth Circuit stated,

> "Defendant also alleges that Fed.R.Crim.P. 32(c)(3)(D) requires factual findings when a defendant alleges an inaccuracy in the presentence report. Because the district court did not rely on any alleged inaccuracies in the presentence report when it entered its order of forfeiture, after defendant stipulated to forfeiture within his guilty plea, we focus our analysis on Rule 11(f)."

United States v. Libretti, 38 F. 3d 523, 527 n. 5(10th Cir. 1994).

It is difficult to see how the District Court could not have relied on any alleged inaccuracies in the presentence report, but at the same time make the requisite findings necessary to forfeit property as substitute assets under §853(p). This is a contradiction. Defendant stated in the presentence report that he derived no more than $70,000.00 from the offense of conviction. The Order of Forfeiture already exceeded $400,000.00, when, in addition, Petitioner's employee payroll savings plan was forfeited as substitute assets. To forfeit the

employee payroll savings plan as substitute assets the District Court had to rely on an alleged inaccuracy, such inaccuracy being the amount of monetary gain Defendant derived from the offense of conviction. That is, the Court had to rely on the government's disputed claims that Defendant had derived monetary gain in an amount exceeding that which Defendant claimed. In addition, the District Court would also have had to find that this alleged, but unavailable, monetary gain, was not available for forfeiture as a result of any act or omission of Defendant, and not unavailable for any other reason. The Tenth Circuit was unable to identify any facts upon which the District Court could have relied on in order to forfeit Petitioner's legitimately earned, nonforfeitable employee payroll savings plan, as substitute assets.

Thus, Respondent's erroneous claims, at pages 2 and 13, RB, and permeated throughout Respondent's Brief, that the forfeiture of all of the property included in the Order of Forfeiture was supported by facts in either the indictment or the record must fail, in light of truth and reason. In light of the fact that the above described real and personal property was neither "specified" in the indictment, nor property subject to forfeiture as described in §853, the Respondent's claims to the contrary defy both logic and common sense.

II. A FINDING OF A FACTUAL BASIS FOR THE FORFEITURE OF PROPERTY UNDER § 853 IS REQUIRED TO PREVENT THE VIOLATION OF THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS, AND TO GUARANTEE THAT THE DEFENDANT'S PUNISHMENT DOES NOT EXCEED THE PUNISHMENT AUTHORIZED BY CONGRESS

As the Supreme Court held in Whalen v. United States, 445 U.S. 684, 63 L.Ed.2d 715, 100 S.Ct. 1432 (1980), a defendant has a right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress. Petitioner in this case contends that a defendant also has a right to be deprived of property as punishment for criminal conduct only to the extent authorized by Congress.

The criminal forfeiture of Petitioner's property was a penalty, inflicted as punishment for criminal conduct. RB. at 9. The power to prescribe the punishments to be imposed upon those found guilty of criminal offenses resides wholly with Congress. Whalen, 445 U.S. at 689, 63 L.Ed.2d at 722, 100 S.Ct. 1432. If a federal court exceeds its own authority by forfeiting property under § 853 that is not described as forfeitable under § 853, the federal court violates the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty and constitutional rights. Federal courts may constitutionally impose only such punishments as Congress has seen fit to authorize.

Congress has not authorized the forfeiture of property, under § 853, that is not described as forfeitable under § 853.

In order to prevent the forfeiture of nonforfeitable property, a factual basis for a forfeiture must be found to exist. For should a court ever forfeit property under § 853 that was not subject to forfeiture under § 853, then the defendant's constitutional guarantee to be punished only to the extent authorized by Congress has been violated. In this case at bar, Petitioner's right to be punished only to the extent authorized by Congress has been violated. Property not subject to forfeiture under § 853 has been forfeited under § 853. The Tenth Circuit explained this dichotomy by finding that Petitioner "agreed" to the forfeiture, so therefore, the District Court was not required to find any factual basis as to whether or not any of the property, such as Petitioner's employee payroll savings plan, was subject to forfeiture under § 853. The Tenth Circuit's holding was erroneous. In so ruling, the Tenth Circuit has upheld the propriety of any sentencing scheme that exceeds the punishment authorized by Congress, so long as the sentence is "agreed" to by the defendant, or the result of a "bargained for exchange." In allowing the District Court to hand down a sentence that exceeds the punishment authorized by Congress, the Tenth Circuit ignored the constitutional principle of separation of powers. The Constitution does not allow a District Court to hand down a sentence that exceeds the punishment authorized by Congress, regardless of whether the defendant "agreed" to the excessive punishment, or whether the excessive punishment was the result of a "bargained for exchange." When the District Court entered the Order of Forfeiture that resulted in the forfeiture

of Petitioner's nonforfeitable property, the District Court violated both the Constitutional principle of separation of powers, and violated Petitioner's constitutional right to be punished only to the extent authorized by Congress.

CONCLUSION

In cases where the forfeiture of property is inflicted as a punishment for criminal conduct, a defendant's constitutional right to be punished only to the extent authorized by Congress can only be guaranteed when a factual basis for the deprivation of property is found to exist. If a factual basis for the criminal forfeiture of a piece of property is not required to be found, then what guarantee does a defendant, being sentenced to a forfeiture of property under § 853, have that the forfeiture will not include nonforfeitable property, and what remedy would a defendant have if a sentencing court erroneously forfeited nonforfeitable property?

For the above stated reasons, neither the record nor the indictment could have provided an "ample factual basis" for the forfeiture of over $350,000.00 worth of nonforfeitable property which was neither "specified" in the indictment, nor shown in the record to be subject to forfeiture. No degree of analysis of the record provides "an ample factual basis" for the forfeiture of Petitioner's employee payroll savings plan as substitute assets under §853(p), or for the forfeiture of any of the other property

included in the Order of Forfeiture, but not specified in the indictment as alleged to be forfeitable, as Rule 7(c)(2) Fed.R.Crim.P. requires. Based on the facts and the record, further review is warranted.

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

Joseph V. Libretti, Jr.

Joseph V. Libretti, Jr.
Petitioner, pro se

March 1995

CERTIFICATE OF SERVICE

I certify that on March 27, 1995, I sent a copy of the foregoing PETITIONER'S REPLY BRIEF to the following parties, by depositing same, postage paid, in the U.S. Mails.

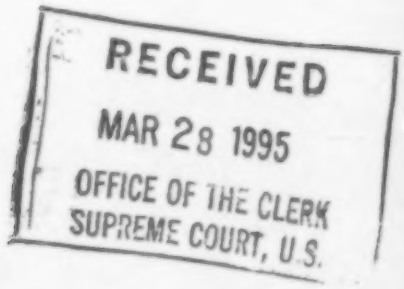
Drew S. Days, III
Solicitor General
U.S. Dept. of Justice
10th and Pennsylvania Ave., N.W.
Washington, D.C. 20530

Jenine Jensen
Federal Public Defender
1099 18th St., Plaza Tower #300
Denver, Co. 80202

_____

Joseph V. Libretti, Jr. 04705-091
F.C.I Phoenix
37910 N. 45th Av., Dept. 1700
Phoenix, Az. 85027
March 21, 1995

SUPREME COURT OF THE UNITED STATES
CLERK'S OFFICE
1 FIRST STREET, N.E.
WASHINGTON, D.C. 20543



Clerk Suter:

Please find enclosed an original and 40 copies of Petitioner's Reply Brief in case 94-7427. Please file this with the Supreme Court. Thank you.

Respectfully,

Joseph V. Libretti, Jr.
Petitioner, pro se

JUN 5 1995
OFFICE OF THE CLERK

No. 94-7427

In The

Supreme Court of the United States

October Term, 1994

JOSEPH V. LIBRETTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

JOINT APPENDIX

SARA SUN BEALE
(Appointed by this Court)
Duke University School
of Law
P.O. Box 90360
Corner of Science Drive
& Towerview
Durham, N.C. 27708-0360
Telephone: 919-613-7091
Counsel for Petitioner

DREW S. DAYS
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
Telephone: 202-514-2201
Counsel for Respondent

Petition For Certiorari Filed, December 27, 1994
Certiorari Granted, March 27, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

333 pp

TABLE OF CONTENTS

Page

Chronological List of Relevant Docket Entries 1

Restraining Order and Attachment A, April 2, 1992 25

Motion to Amend Attachment A to the Restraining Order, Filed April 9, 1992 32

Order Granting United States' Motion to Amend Restraining Order Attachment A, April 8, 1992 34

Superseding Indictment, Filed May 22, 1992..... 38

Bill of Particulars and Second Motion to Amend Attachment A to the Restraining Order, Filed Sept. 15, 1992 72

Order Granting United States' Second Motion to Amend Restraining Order Attachment A and Amended Attachment A, Filed Sept. 15, 1992 74

Plea Agreement, Oct. 5, 1992 79

Transcript of Proceedings, Change of Plea, October 5, 1992 84

Prosecutor's Statement, Filed Nov. 13, 1992 122

Transcript of Proceedings, Sentencing, Dec. 23, 1992 136

Order of Forfeiture, Filed Dec. 23, 1992 155

Judgment & Commitment, Filed Dec. 23, 1992..... 165

Defendant's Affidavit In Support Of Third Party Claimant Claudia Porter's Motion for Return Of Property Pursuant To Title 21 U.S.C. § 853(n)(6)(A) ... 171

Transcript of Proceedings, Hearing Feb. 9, 1993 173

Transcript of Proceedings, Hearing Mar. 26, 1993 ... 184

TABLE OF CONTENTS – Continued

Page

Statement and Testimony of Claudia Porter 184
Examination by Court 184
Cross by Mr. O'Donnell 185
Recross by Ms. Woodhouse 186
Statement and Testimony by Beverly Libretti 187
Examination by the Court 187
Cross by Ms. Woodhouse 192
Cross by Mr. O'Donnell 198
Recross by Ms. Woodhouse 203
Testimony by Tony Young, Government's Witness 204
Direct examination by Ms. Woodhouse 204
Cross by Mr. O'Donnell 239
Redirect by Ms. Woodhouse 246
Recross by Mr. O'Donnell 248
Testimony by Beverly Libretti 253
Statement and Testimony of Joseph V. Libretti, Jr 262
Examination by the Court 262
Order Amending Forfeiture Order, Filed April 2, 1993 298
Opinion and Order Court of Appeals, Filed Oct. 19, 1994 313
Order of Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, March 27, 1995 330

CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

United States District Court for the District of Wyoming

No. 92CR0006B

1/31/92	1)	Indictment
	13)	Libretti – Courtroom Minute Sheet – ARR; plea of not guilty to Cts 1-12, Deft has 10 days for motions, JT 3/16/92 at 9:30 a.m.
4/2/92	99)	Ex Parte Motion for entry of protective order
	100)	Ex Parte Memorandum of points & authorities in support of motion for entry of a protective order
	101)	Restraining Order cc mld 4/2/92
4/9/92	104)	Motion to amend attachment A to the restraining Order issued by the Court on 4/2/92
	105)	Order granting US motion to amend restraining order attachment A
5/22/92	122)	SUPERCEDING INDICTMENT
5/27/92	125)	COURTROOM MINUTES SHEET of rearraignment on superseding indictment. Pleas of NG entered to all counts. Rptr Cole.
9/15/92	174)	Bill of Particulars & second motion to amend attachment A to the restraining order issued by the Court on April 2, 1992

	175)	Order granting US second motion to amend restraining Order attachment A cc mld 9/15/92
9/30/92	188)	Motion to Compel Testimony – T.R. Libretti
	189)	Motion to compel testimony – J.V. Libretti SR
	190)	Motion to compel testimony – W. Libretti
	191)	Motion to compel testimony – T. Standley
	192)	Motion to compel testimony – S. Raymond
	193)	Order – cc hand delivered 9/30/92
	194)	Order compelling testimony – J. V. Libretti Sr.
	195)	Order compelling testimony – S. Raymond
	196)	Order compelling testimony – T. Standley
	197)	Order compelling testimony – W. Libretti
	198)	Order compelling testimony – T.R. Libretti
10/5/92	202)	Courtroom Minute Sheets – Jury Trial Day 1 through Day 5; (9/28-10/2/92)

	203)	Courtroom minute sheet – COP; plea of guilty to CL 6, Deft Libretti referred to probation for presentence report *ALL EXHIBITS RETURNED TO US ATTY*
10/5/92	210)	Libretti – Plea Agreement
	252)	Libretti – Prosecutor's Statement
12/16/92	256)	Notice setting sentencing for deft Libretti for 12/23/92 at 11:15 a.m. before Judge Brimmer cc mld 12/16/92
12/23/92	257)	Motion for entry of Forfeiture order
12/23/92	258)	Libretti – Courtroom Minute Sheet – Sentencing 240 mos impris; 5/ yrs supr rel w/ spec cond, $5,000.00 fine; $50.00 SA
	259)	Order of Forfeiture (10 Cert cys to USA)
	260)	Memorandum of sentencing hearing & report of statement of reasons
12/23/92	261)	Order cc mld 12/24/92
	262)	Libretti – Judgment including sentence under the sentencing reform EOD & mlf 12/24/92
12/28/92	263)	Second Motion (sealed)
	264)	Order (Sealed)
12/29/92	265)	Libretti – Notice of Appeal (forfeiture)

12/30/92	266)	Libretti – Notice of Appeal (fine)
1/4/93	267)	Motion for payment of third party claim under 21:853(n)(6)(B) & Affidavit in support
1/15/93	268)	Libretti – Letter of USCA – assigning case #93-8001 (fine)
	269)	Process receipt & return (2)
1/19/93	270)	Libretti – Motion for leave to Proceed IFP on Appeal
	271)	Libretti – Affidavit in support of Motion to proceed on appeal IFP
	272)	Libretti – Certificate of Service
	273)	Libretti – Letter of USCA assigning case # 93-8000 (forfeiture)
	274)	Affidate in support of third party claimants motion & petition to amend the order of criminal forfeiture/ Motion & petition to amend the order of criminal forfeiture under authority of 21:853(n)(6)(A)
	275)	Libretti – Affidavit in support of defts motion for satisfaction of third party interests in defts property under authority of 21:853(n)(6)(A) & (B) & Defts Motion for satisfaction of third party interest in defts property under authority of 21:853(n)(6)(A) & (B)
1/20/93	276)	Libretti – USA's opposition to deft motion for stay

1/6/93	278)	Libertti [sic] – Motion for stay of execution of order of criminal forfeiture under Rule 38 FRCrP, Rule 8 FRAP & Rules 62, 65 FRCvP
1/22/93	280)	Libretti – Motion for return of property pursuant to 21:853(n)(6)(A)
	281)	Libretti – Affidavit in support of third party claimant's motion for return of property
	282)	Libretti – Deft Affidavit in support of third party claimant Claudia Porter's motion for return of property pursuant to 21:853(n)(6)(A)
	283)	Libretti – Defts Affidavit in support of third party claimant Claudia Porter's motion to amend the order of criminal forfeiture for third party interest under 21:853(n)(6)(A) & (B)
	284)	Libretti – Affidavit in support of third party claimant's motion to amend the order of criminal forfeiture under 21:853(n)(6)(A) & (B)
1/25/93	285)	Porter – Motion to amend the order of criminal forfeiture for third-party interests under 21USC [sic] 853(n)(6)(A) & (B).
1/26/93	286)	Svs by USM upon Claudia Porter
	287)	Svs by USM upon Seattle Mortgage
1/28/93	289)	USM's RETURN OF SERVICE of order of forfeiture upon Lincoln County Clerk on 1/7/93
1/29/93	290)	Precess [sic] receipt & return

2/2/93	294)	Motion to compel deft to turn over certificates for GNMA Customer pool accoutn [sic] numbers
	296)	Process receipt & return
2/9/93	297)	Order compelling Joseph V. Libretti Jr to turn over GNMA Certificates cc hand delivered 2/9/93
	298)	Courtroom Minute Sheet – Libretti motions heard – Ancillary Hearing set 3/26/93 at 9:00 a.m. before Judge Brimmer
	299)	Order – RE; Libretti Motions
2/12/93	300)	Libretti – Order on hrng of 2/9/93
2/16/93	301)	libretti [sic] – Motion for extension of time to file Notice of Appeal
	302)	Libretti – Notice of Appeal (Special Assessment)
2/17/93	306)	Libretti – 3rd party claimant's motion & petition for third party interests in cashiers checks & GNMA & FNMA securities under 21:853(n)(6)(A) w/ affidavit in support
2/19/93	307)	Libretti – SUBMISSION of Affidavit of Publication
2/22/93	308)	Libretti – defts MOTION for APPOINTMENT of Counsel and REQUEST for Court ordered funds to allow deft to comply with order compelling deft to turn over GNMA certificates

	309)	Libretti – THIRD PARTY CLAIMANTS MOTION & PETITION asserting third party property interests in bank svgs acct under title 21 USC (Dr. & Mrs. Liberetti [sic])
	310)	Libretti – Deft DESIGNATION OF RECORD on Appeal 93-8001
	311)	Libretti – Deft Transcript order form due 3/25/93 93-8001
2/23/93	312)	Libretti – PROCESS RECEIPT & return – First Federal Bank for Savings, Des Plaines, IL served 2/11/93 (forfeiture)
	313)	Libretti – PROCESS RECEIPT & return – Cole Taylor Bank Weeling [sic], IL served 2/11/93 (forfeiture)
	314)	Libretti – PROCESS RECEIPT & return – LaSalle Talman Bank, Chicago, IL served 2/12/93 (forfeiture)
	315)	Libretti – Pltf DESIGNATION of Record on Appeal
	316)	Libretti – PROCESS RECEIPT & return – Barclay's American Mortgage Corp, Charlotte, NC served 2/17/93 (forfeiture)
3/9/93	319)	Libretti – BRIEF in support of deft, Porter's and other thrid [sic] party's motions for amendment of order of forfeiture
	320)	Libretti – AFFIDVAIT [sic] in support of brief

3/18/93	324)	Ex Parte Motion for issuance of subpoena in forma pauperis
	325)	Ex Parte motion for issuance of subpoenas duces tecum in. forma pauperis
3/22/93	326)	Ex Parte Order for issuance of subpoenas in forma pauperis
	327)	Ex Parte Order denying motion for issuance of subpoenas duces tecum in forma pauperis
3/23/93	328)	Libretti – Motion for return of property under Rule 41(e)FRCrP 21:853 & 18:924(d)(1)
3/24/93	329)	Libretti – MOtion [sic] for return of property under Rule 41(e) FRCrP
3/25/93	330)	Motion for return of property under Rule 41(e) FRCrP
	331)	Defts Brief in support of oral argument for the March 26, 1993 Hearing
3/26/93	332)	Libretti – Courtroom mInute [sic] Sheet – forfeiture hearing, matter referred to U.S. Magistrate
3/30/93	335)	Motion to allow sale of firearms
		TRANSCRIPT OF CHANGE OF PLEA held 10/5/92 Certified Copy & Copy filed
3/31/93	336)	Order Allowing sale of firearms cc mld 3/31/93
3/29/93	337)	Notice of US Atty to 3rd parties w/ returns

3/30/93		Liberetti [sic] – Transcript of COP 10/5/92
4/2/93	338)	Libretti – Order amending 12/23/92 Forfeiture Order ccmld 4/5/93
4/5/93	339)	Libretti – Motion for discovery & transcripts
4/1/93	340)	Liberetti [sic] – Pltf Designation of Record #93-8000
4/7/93	343)	Libretti – Designation of record by USA [sic] in 93-8001
		Record sent to USCA 93-8000 (3 vols) forfeiture
4/8/93		Libretti – Letter to USCA trans ordered and due by 5/8/93 (USA)
4/9/93		TRANSCRIPT – 9/30/92 TRIAL PROCEEDINGS vol III of V
		TRANSCRIPT – 9/30/92 TRIAL PROCEEDINGS VOL II of V
4/5/93	346)	SUBPOENA to Beverly Libretti served 3/23/93
4/9/93	347)	Libretti – Motion for written findings of facts and conclusions of law related to 4/2/93 denial of motions for return of property
4/12/93	348)	Libretti – NOTICE of Appeal 4/2/93 order
4/15/93	349)	MOTION to amend the 12/23/92 order of cr forfeiture
4/14/93		TRANSCRIPT OF Hearing held 3/26/93 (cert. cy & cy)

		TRANSCRIPT of trial proceedings vol IV of V 10/1/92 cert cy & cy
4/19/93		Letter to USCA re: appeal filed 4/12/93 (forfeiture)
4/28/93		TRANSCRIPT of TRIAL PROCEEDINGS held 10/2/92 vol V of V cert. copy & copy filed
4/30/93	352)	Libretti - MOTION TO PROHIBIT sale of firearms
5/4/93		TRANSCRIPTS of MOTIONS PROCEEDINGS held 2/9/93 cert copy & copy filed
5/4/93	353)	Libretti – USA MOTION to reconsider and vacate courts order amending 12/23/92 forfeiture order
5/5/93		Libretti – Letter from USCA re: possible jurisdictional defect; record needs to be sent 93-8029
5/6/93	354)	Libretti – NOTICE setting 2nd prehearing conf. on 6/9/93 @ 2:00 pm in CHY before Mag. Beaman cc md 5/7/93
5/10/93	355)	Libretti designation of record on appeal by USA on 93-8000
5/11/93	356)	Libretti – CERTIFICATE OF SERVICE from USA re: Designation of Record
5/7/93	357)	Libretti – ORDER on Prehearing Converence [sic] held 5/6/93 before Mag. Judge Beaman. Next hearing set for 6/9/93 @ 2: pm in CHY (deft to appear by telephone) (wcb 5/7/93) cc md 5/13/93

5/27/93	369)	Libretti – ENTRY of Appearance – Pro SE
	370)	Libretti – DESIGNATION or record on appeal by deft 93-8001
5/28/93	371)	Libretti – ORDER Postponing Sale of Firearms (5/28/93 cab) eod 6/7/93 cc md 6/7/93
6/4/93	374)	Libretti – MOTION to stay Proceedings in Mag. Court
6/7/93	375)	Libretti – ORDER staying Proceedings in Mag. Court (cab 6/7/93) eod 6/7/93 cc md 6/7/93
6/9/93		Record sent to USCA (15 volumes) also transcript letter sent cc counsel 6/9/93
6/7/93	376)	Libretti – MOTION for release of property under rule 41(e)
7/14/93	380)	Libretti – MOTION to Compel USA to pay property taxes re: Lot 39 Star Valley Ranch
8/3/93	381)	LIBRETTI – PROCESS Receipt and Return to RAF Financial Corp. (re: order of forfeiture)
	382)	Libretti – PROCESS receipt and Return to Vectra BAnk [sic] of Lakewood (re Order of forfeiture
8/5/93		Copies of transcripts vols. 6-14 mailed to Libretti
10/4/93	385)	ORDER from USCA denying remand for limited appeal. Fed Pub Def in CO appointed counsel for appeals.

1/18/94	389)	Libretti – MOTION for return of business records
	390)	Libretti – MOTION for return of $33,160
	391)	Libretti – BRIEF in support of motion to return $33,160 by deft
3/7/94	394)	Libretti – re: appeal 93-8029 – lack of jurisdiction appeal is dismissed (does not affect appeals 93-8000 or 93-8001
3/14/94	396)	Libretti – Third Party motion for finding of due process violation and order invalidating forfeiture of real property on constitutional grounds (cy sent to USCA)
3/22/94	398)	Libretti – US RESPONSE to 3rd party claimant Dr. Joseph Libretti, Sr.'s motion to invalidate forfeiture (cys to USCA)
4/18/94	397)	THIRD PARTY CLAIMANT'S REPLY to motion to invalidate forfeiture of real property
5/2/94	399)	MOTION to dissolve restraining order by deft
5/23/94	400)	NOTICE of motion for dissolution of restraining order
8/22/94	401)	Libretti – ORDER from USCA requesting 7/22/92 motion transcript (Orig trans was sent with Sabell appeal and destroyed, cy ordered from WY Rptrs)

8/24/94		Above missing transcript re-transcribed by WY RPTRS and file stamped with original date of 7/22/92 – copy faxed to USCA
10/11/94	402)	Libretti – ORDER AND JUDGMENT re: 93-8001 appeal USCA affirmed USDC decision
12/5/94	405)	Libretti – MANDATE from USCA re: 93-8000 appeal forfeiture is affirmed, govt motion to dismiss is denied and defts motion for limited remand is denied as moot.
12/20/94	406)	Libretti – MOTION by Pltf for order permitting sale of firearms
12/21/94	407)	Libretti – Motion by USA to amend certificate number
12/28/94	410)	Libretti – Order allowing sale of firearms
12/30/94	412)	Libretti – Notice of Motion and Motion for dissolution of restraining order
1/3/95	413)	Libretti – Defts Motion in opposition to Pltf Motion for order permitting sale of firearms, defts Motion for amendment of order of forfeiture & motion for return of property or in the alternative, defts motion for withdrawal of guilty plea pursuant to Rule 30(d) FRCrP

	414)	Dept Motion in opposition to pltf motion to amend certificate number, defts motion for dissolution of restraining order or in the alternative, defts motion for withdrawal of guilty plea pursuant to Rule 32(d) FRCrP
1/9/95	415)	LETTER from USCA that A Writ of Certiorari was filed on 12/27/94 and assigned Supreme Court # 94-7427
1/12/95	416)	Libretti - Motion for order regarding machine gun retained by the US Marshals service and the BATF
1/13/95	417)	Libretti - Order cc mld 1/13/95
1/20/95	418)	Libretti - Third party claimants motion for amendment of order of forfeiture & return of property & 3rd party claimants motion for amendment of order amending 12/23/92 order of forfeiture
1/23/95	419)	Libretti -- Defts additional motion in opposition to Pltf motion to amend certificate number, defts mtn for dissolution of restraining order or in the alternative defts mtn to withdraw plea of guilty pursuant to Rule 32(d) FRCrP
	420)	Libretti - Motion for reconsideration of Court's 1/13/95 Order granting pltf motion for order regarding machine guns retained by the US Marshals service & the BATF
	421)	Libretti - Order amending certificate number cc mld 1/27/95

2/14/95	422)	Libretti - Order denying reconsideration cc mld 2/14/95
2/15/95	423)	Librettis [sic] - Motion for appointment of counsel for perparation [sic] of a motion pursuant to 28:2255 or in the alternative, motion for dissolution of restraining order on GNMA Bonds
2/24/95	424)	Govt - Motion to make Rule 6(e) of the FRCRP disclosure of grand jury testimony
2/24/95	425)	Order permitting disclosure of grand jury testimony cc mld 2/24/95
3/13/95	426)	MOTION by Libretti for judgment on the pleadings pursuant to Rule 12(c) Fed.R.Civ.P.
4/3/95	427)	Libretti - Motion challenging the factual basis for the forfeiture of real & person property, motion to set aside the forfeiture of real & personal property, and motion objecting to the use of transcripts pursuant to RUle [sic] 6(e) FRCrP
5/12/95	428)	Govt MOtion [sic] for stay

United States Court of Appeals for the Tenth Circuit

No. 93-8000

1/13/93	1	[646727] Criminal case docketed. Preliminary record filed. Fee due 1/25/93 for Joseph V. Libretti (kc) [93-8000]
1/14/93	4	[647070] Jurisdictional review complete. Fee or IFP forms due 2/23/93 IN DISTRICT COURT for Joseph V. Libretti; Record on appeal due 1/25/93 from dist. court; Notice of appearance due 1/25/93 for Gay Woodhouse; Notice of appearance due 2/23/93 for Joseph V. Libretti; and Appellant's brief on the merits due 2/23/93 for V. Libretti. (sks) [93-8000]
1/22/93	8	[648782] Notice of appearance filed by Gay Woodhouse in 93-8000 as attorney for USA in 93-8000. CERT. OF INTERESTED PARTIES (y/n): n (kc) [93-8000]
2/2/93	9	[651495] Appellant's addendum to motion filed by Appellant Joseph V. Libretti in 93-8000 to appoint attorney. Original and 0 copies c/s: y (lwb) [93-8000]
2/12/93	14	[654508] District court order granting leave to proceed in forma pauperis filed. ROA due 2/26/93 for Clarence A. Brimmer (lwb) [93-8000]

2/16/93	16	[654546] Order filed by Judge(s) McKay denying Appellant/Petitioner motion to appoint attorney [651495-1] Parties served by mail. (lwb) [93-8000]
2/18/93	19	[655321] Appellee's motion to dismiss case [93-8000] filed by USA in 93-8000. Original and 3 copies. c/s: y (kc) [93-8000]
2/18/93	21	[655532] Appellant's motion for stay of forfeiture proceedings submitted to panel. (lwb) [93-8000]
2/22/93	22	[656166] Order filed by RLH – appellant's response to appellee's motion to dismiss due 3/4/93 for Joseph V. Libretti. Parties served by mail. (kc) [93-8000]
2/25/93	24	[657080] Order filed by Judge(s) McKay, Anderson denying Appellant/Petitioner motion for stay of district court's forfeiture order. [648192-1] Parties served by mail. (lwb) [93-8000]
3/8/93	26	[659908] Appellant's response filed by Joseph V. Libretti in 93-8000 to Appellees motion to dismiss case Original and 2 copies. c/s: y (kc) [93-8000]

3/15/93	28	[661574] Appellant's motion for reconsideration for stay of execution of order of forfeiture; request for evidentiary hearing, filed by Appellant Joseph V. Libretti in 93-8000, Appellant Joseph V. Libretti in [93-8000, 93-8001]. Original and 0 copies c/s: y (kc) [93-8000 93-8001]
3/31/93	31	[665448] Appellant's motion for reconsideration submitted to panel. (jtp) [93-8000]
4/5/93	32	[666522] Order filed by Judge(s) McKay, Anderson denying Appellant/Petitioner motion for reconsideration [661574-1] Parties served by mail. (lwb) [93-8000]
4/16/93	35	[669866] Order filed by RLH - "Both parties shall forthwith advise this court if there is any reason not to brief and decide appellant's direct criminal appeal even if the court should remand the appeal of the forfeiture proceedings." Response due 5/3/93 for USA, Joseph V. Libretti in 93-8000, 93-8001. Parties served by mail. (kc) [93-8000 93-8001]
4/21/93	36	[671002] Appellant's response to the court's order of 4/16/93 filed by Joseph V. Libretti in 93-8000, 93-8001. Original and 3 copies. c/s: y (kc) [93-8000 93-8001]

5/4/93	37	[675787] Appellee's response to order dated April 16, 1993, and defendant's motion for limited remand filed by USA in 93-8000, 93-8001. Original and 3 copies. c/s: y. (kc) [93-8000 93-8001]
5/6/93	38	[675531] Appellant's motion to remand, appellee's response and appellant's response in 93-8000, 93-8001, submitted to panel. (kc) [93-8000 93-8001]
9/1/93	45	Order filed RLH - Appellee's motion to dismiss REFERRED TO PANEL ON THE MERITS. (ktc) Parties served by mail. (ss) [93-8000]
9/14/93	53	[710484] Appellant's PRO SE brief filed by Joseph V. Libretti in 93-8000. Original and 3 copies. c/s: y. Served on 9/11/93 Oral argument? pro se. (lwb) [93-8000]
9/15/93	49	[707051] Appellant's motion for general relief (to refile) submitted to panel. (ktc) (ss) [93-8000]
9/29/93	51	[710399] Order filed by Judge(s) Seymour, Kelly appointing Michael Katz, Federal Public Defender to represent appellant. Parties notified by mail. [93-8000, 93-8001, 93-8029], - supplemental brief due 10/29/93 for USA in 93-8000 Parties served by mail. Appellee's brief due 30 days from service of sup. br. in 93-8000 and 93-8001. (lwb) [93-8000 93-8001 93-8029]

10/6/93	54	[712470] Appellee's motion to allow sale of forfeited property [93-8000] filed by USA in 93-8000 and submitted to panel. (kc) [93-8000]
10/8/93	55	[713229] Appellant's response to government's motion to allow sale of forfeited property filed by Joseph V. Libretti in 93-8000 and submitted to panel. Original and 3 copies. c/s: y (kc) [93-8000]
10/20/93	56	[715588] Order filed by Judge(s) Seymour, Kelly granting Appellee/ Respondent motion to allow sale of forfeited property, so long as the proceeds are held in escrow pending appeal. [712470-1] Parties served by mail. (lwb)
10/22/93	58	[716142] Appellant's response to government's motion to allow sale of forfeited property filed by Joseph V. Libretti in 93-8000. Original and 3 copies. c/s: y (kc) [93-8000]
10/29/93	59	[718496] Appellant's motion filed by Appellant Joseph Libretti in 93-8000 to reconsider the order allowing sale of property, and request for findings of fact and conclusions of law [93-8000]. Original and 3 copies c/s: y (kc) [93-8000]
11/18/93	62	[722162] Order filed by Judge(s) Seymour, Kelly denying Appellant's motion for reconsideration of the court's order of 10/20/93. [718496-1] Parties served by mail. (lwb) [93-8000]

12/10/93	67	[727744] Appellant's supplemental opening brief filed by Joseph V. Libretti in 93-8000. Original and 7 copies. c/s: y. (kc) [93-8000]
1/18/94	72	[736602] Appellant's motion for findings of fact and conclusions of law regarding this court's decision granting appellee's motion to sell forfeited property [93-8000] filed by Joseph V. Libretti in 93-8000 and submitted to panel. (kc) [93-8000]
2/4/94	73	[739798] Order filed by Judge Kelly denying Appellant's motion for findings of fact, etc. [736602-1] Parties served by mail. (kc) [93-8000]
2/14/94	77	[747570] Appellee's brief filed by USA in 93-8000, 93-8001, 93-8029. Original and 7 copies. c/s: y. served on 2/11/94. Oral Argument? n. Appendix filed Original and 1 appendix copy. (kc) [93-8000 93-8001 93-8029]
3/4/94	76	[747466] Appellant's pro se reply brief filed by Joseph v. Libretti in 93-8000. Original and 3 copies. c/s: y (kc) [93-8000]
3/17/94	79	[750837] copy of "Third Party Motion for Finding of Due Process Violation and Order Invalidating Forfeiture of Real Property on Constitutional Grounds" filed in district court, filed by Appellant Joseph V. Libretti in 93-8000. Original and 0 copies. c/s: n. (kc) [93-8000]

3/17/94	80	[751203] Appellee's motion to file a supplemental response brief [93-8000, 93-8001] filed by USA in 93-8000, 93-8001. Original and 3 copies. c/s: y (kc) [93-8000 93-8001]
3/22/94	81	[751594] Order filed by RLH granting Appellee's motion to file a supplemental brief [751203-1] in 93-8000. Parties served by mail. (kc) [93-8000 93-8001]
5/26/94	85	[769052] Supplemental record filed: 1 Volume – Sup. Vol. I (Pleadings). Copy filed in Volume: y. (kc) [93-8000]
6/8/94	86	[771770] Case submitted to panel on the briefs pursuant to Rule 34. (sls) [93-8000]
6/8/94	87	[772109] Appellant's motion for limited remand for the purpose of granting the district court . . . filed by Appellant Joseph V. Libretti in 93-8000 to remand case [93-8000]. Original and 3 copies c/s: y (kc) [93-8000]
10/19/94	89	[802793] Terminated on the Merits after Submission Without Oral Hearing; Affirmed; Written, Signed, Published. Logan, authoring judge; Barrett; Russell. [93-8000] (jtp) [93-8000]
11/7/94	91	[809251] Petition for rehearing in banc [93-8000] filed by Joseph V. Libretti in 93-8000. Original and 14 copies. c/s: y (jtp) [93-8000]

11/9/94	92	[809259] Document [809251-1] Petition for rehearing in banc filed by Appellant Joseph V. Libretti Jr. submitted to panel. (jtp) [93-8000]
11/23/94	93	[811805] Order filed by Judges Logan, Barrett, Russell denying Petition for rehearing in banc [809251-1] (kc) [93-8000]
12/1/94	94	[813875] Mandate issued. Mandate receipt due 1/3/95 (jtp) [93-8000]
12/9/94	95	[816054] Mandate receipt filed. (kc) [93-8000]
1/4/95	96	[822368] Petition for writ of certiorari filed on 12/27/94 by Appellant Joseph V. Libretti in 93-8000. Supreme Court Number 94-7427. (mt) [93-8000]
3/1/95	97	[836717] Case file closed. 2/28/97 (das) [93-8000]
3/28/95	98	[843933] Appellant's motion filed by Appellant Joseph V. Libretti in 93-8000 [93-8000] to borrow the record on appeal for 10 days for purposes of preparing brief on crt. 5 volumes of pleadings, 9 volumes of transcripts, PSR and 2 volumes of sup. roa. Original and 3 copies c/s: y (lwb) [93-8000]
3/29/95	99	[843939] Order filed by Judge(s) Brorby, Kelly granting Appellant/ Petitioner motion to borrow court's record for purposes of cert. [843933-1] Parties served by mail. (lwb) [93-8000]

3/31/95	101	[844810] Supreme Court order dated 3/27/95 granting motion for leave to proceed in forma pauperis and granting the petition for writ of certiorari filed. (mt) [93-8000]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	No. 92CR0006B
JOSEPH V. LIBRETTI JR.,	)	
Defendant.	)	

RESTRAINING ORDER

(Filed Apr. 2, 1992)

THIS MATTER having come before the Court upon the Motion of the United States of America for the entry of a protective order pursuant to 21 U.S.C. §§ 846, 848, 853, and 18 U.S.C. § 982(a)(1), and it appearing to the satisfaction of this Court:

1. That on January 31, 192 [sic], a federal grand jury of this District has returned an Indictment charging the above-named Defendant with violations, *inter alia*, of 18 U.S.C. §§ 1956, AND 21 U.S.C. § 846, 848 and alleging that the property named in this Order would, in the event of conviction, be subject to forfeiture pursuant to 21 U.S.C. § 848 (a) and 853 and 18 U.S.C. § 982(a)(1);

2. That the United States has moved *ex parte*, for a Protective Order pursuant to 21 U.S.C. §§ 848 (a) and 853, and 18 U.S.C. § 982(b)(1), to preserve the status quo and prevent the above-named Defendant from alienating, encumbering, or wasting said forfeitable property; and

3. That reasonable cause has been shown for the entry of a protective order to preserve the property named in this Order, based upon the Indictment and the Supporting Motion and Memorandum submitted by the United States.

4. It is, therefore, the ORDER of this Court that this Protective Order issue and that as to all of the property described in Attachment A hereto, incorporated herein by this reference:

The Defendant, JOSEPH V. LIBRETTI JR., his agents, servants, employees, attorneys, family members, those persons having any interest or control over the property described in Attachment A and those in active concert or participation with the above-named Defendant, shall not, without approval of this Court upon notice to the United States and an opportunity for the United States to be heard:

(a) alienate, dissipate, transfer, sell, assign, lease, pledge, encumber, or dispose of, in any manner, directly or indirectly;

(b) cause to be alienated, dissipated, transferred, sold, assigned, leased, pledged, encumbered, or disposed of in any manner; or

(c) take, or cause to be taken, any action which could have the effect of concealing or moving from the jurisdiction of this Court, or that would have the effect of depreciating, damaging or in any way diminishing the value of any property named in this Order.

5. It is further ORDERED that if any of the above-described property has been or is transferred or disposed of by any means, the above-named Defendant shall

account to the Court for the disposition and location of the property.

6. IT IS FURTHER ORDERED that the financial institutions named herein are directed to prevent and are otherwise enjoined from transferring (by wire or otherwise), conveying or disposing of any monies held in the bank accounts described in Attachment A.

IT IS FURTHER ORDERED that the financial institutions shall continue to receive and credit monies to the accounts identified in Attachment A and any such additional funds shall be subject to this Order and frozen pursuant to its terms. IT IS ORDERED that the respective financial institutions continue to receive and credit monies to this account. Any such additional funds shall be subject to this Order and frozen pursuant to its terms. It is further ORDERED that all financial institutions that maintain accounts identified herein shall immediately inform the government agents who serve the certified copies of this Order what each account balance is on the date of service and thereafter to the extent any account balance increases. The Court directs that Special Agents of the United States Internal Revenue Service, U. S. Customs Service, and the Drug Enforcement Administration are authorized to serve on the financial institutions named herein certified copies of this Order.

7. IT IS FURTHER ORDERED that the Defendant shall be served forthwith a copy of this Order and the papers of the United States seeking this Order.

8. IT IS FURTHER ORDERED that the Defendant will be allowed, in the alternative, to execute a satisfactory performance bond pursuant to 18 U.S.C. § 1963(d),

and the Court will make the determination if it is a satisfactory performance bond, but this Order will be in effect and until such time as the Court determines that the proffered bond is satisfactory.

9. This Order shall remain in effect until further Order of the Court or until the Court makes modification of the Order as appears necessary in the interest of justice and consistent with the purposes of 21 U.S.C. § 853 and 18 U.S.C. § 982.

DATED this 2d day of April, 1992.

/s/ illegible
UNITED STATES
DISTRICT COURT

CERTIFIED A TRUE COPY:

Clerk

By /s/ illegible
Deputy Clerk

ATTACHMENT A

A. REAL PROPERTY

All that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, located in Lot 39 of Star Valley Ranch, Plat 10, Lincoln County, Wyoming.

B. CONVEYANCES

Blue 1990 Toyota Celica GTS 2-door VIN JT2ST85N4L0035365

Silver/Maroon 1990 Chevrolet 4-wheel drive pickup with camper shell, VIN 1GCDK14KXLZ218430

C. CASH PROCEEDS

Approximatelly [sic] One Hundred Two Thousand Three Hundred Sixty Dollars ($102,360) in United States currency, in that such sum in aggregate was received in exchange for the distribution of controlled substances to-wit: marijuana, a Schedule I controlled substance, and cocaine, a schedule II controlled substance, and subsequently expended, spent, distributed or otherwise disposed of during the period beginning on or about January 1, 1982, and continuing to the present.

D. JEWELRY

Diamond ring given to Claudia Porter.

E. PROPERTY

1977 Windsor 14 X 70 Mobile Home VIN 3CRKFKR1HBEA, Title Nos. 04-0427637 and 04-39651 located in Green River, Wyoming and any rents or profits received thereon from this date forward.

F. BANK ACCOUNTS

1. Customer Account Number 008-666555 managed by Columbia Savings, 5850 South Ulster Circle

East, Englewood, CO 80111, 303-773-3444, which consists of:

a) IRA savings account.

2. Customer Account 60-09495, managed by Vectra Bank of Lakewood, CO 80215, 303-233-8400.

3. Customer Account 1423258, managed by State Bank of Green River, 125 W. Flaming Gorge Way, Green River, WY 82935, 307-875-7930

G. INVESTMENTS

1. Customer Account Number 16-11524406 managed by RAF Financial Corporation, 717 17th Street, Suite 2900, Denver, CO 80202, 303-292-1400, which consists of:

a) municipal bonds issued by Castle Pines North Net District at 9.75%

b) municipal bonds issued by FHLM Group at 8.25%, approximately $5,166.00.

2. GNMA Customer Pool Number 002941X, certificate number 30296455F managed by Barclay's American Mortgage Corporation, 5032 Parkway Plaza Boulevard, P.O. Box 33213, Charlotte, NC 28233, 704-357-7600.

3. GNMA Customer Pool Number 002941, certificate number 03082345SF managed by Barclay's American Mortgage Corporation, P.O. Box 31728, Charlotte, NC 28231.

4. GNMA Customer Pool Number 6994, certificate 2799045SF managed by Seattle Mortgage, 229 Queen Anne Avenue North, P.O. Box C, Seattle, WA 98109.

H. CASHIER'S CHECKS

1. First Federal Bank for Savings Cashier's Check #036886, dated November 15, 1991, in the amount of $542.

2. First Federal Bank for Savings Cashier's Check #036885, dated November 15, 1991, in the amount of $250.

3. First Federal Bank for Savings Cashier's Check 036887, dated November 15, 1991, in the amount of $2,890.

I. SAFE DEPOSIT BOX

1. Safe Deposit box number 2236 located at Countryside Bank; Countryside Court, 1190 South Elmhurst Road, Mt. Prospect, Illinois 60056, 708-593-0800.

2. Safe Deposit box number 5239 located at First Bank of Westland, 10403 West Colfax, Lakewood, Colorado 80215 303-232-3000.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

(Caption Omitted In Printing)

MOTION TO AMEND ATTACHMENT A TO THE RESTRAINING ORDER ISSUED BY THE COURT ON APRIL 2, 1992

(Filed Apr. 9, 1992)

COMES NOW the United States of America, by and through Gay Woodhouse, Assistant United States Attorney for the District of Wyoming, and moves that the attachment to the Restraining Order be amended to include one additional bank account based upon the following:

1. On April 2, 1992, the following account was not known to the United States: Account number 429-43-221, in the name of Dee Smith d/b/a Legal Research, Ltd., at Cole Taylor Bank, 350 West Dundee, Wheeling, IL 60090.

2. It has come to the attention of investigators for the United States that Joe Libretti asked his girlfriend, Claudia Porter, to transfer some of Libretti's funds to Joseph Kalady in care of Kalady's sister, Dee Smith d/b/a Legal Research, Ltd., in the amount of $8,000, which check was issued on or about February 6, 1992.

3. Joseph Kalady is a federal prisoner who was in the Laramie County Detention Facility with Joseph V. Libretti, Jr., during December 1991 and January 1992. Joseph Kalady is not an attorney; Kalady is not affiliated with an attorney; Kalady is not providing legal representation to Joseph V. Libretti, Jr.

4. Because of the transfer of these funds into the account of Dee Smith d/b/a Legal Research, Ltd., this account should, therefore, be subject to the Restraining Order and added to Attachment A thereto.

WHEREFORE, the United States prays that the attachment to the Restraining Order issued on April 2, 1992, be amended to include the above-referenced account.

DATED this 9th day of April, 1992.

Respectfully submitted,

RICHARD A. STACY
United States Attorney

By: /s/ Gay Woodhouse
GAY WOODHOUSE
Assistant United States Attorney

(Certificate Of Service Omitted In Printing)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

(Caption Omitted In Printing)

ORDER GRANTING UNITED STATES' MOTION TO AMEND RESTRAINING ORDER ATTACHMENT A

(Filed Apr. 9, 1992)

This matter having come before the Court upon the motion of the United States of America to amend the attachment to the Restraining Order entered on April 2, 1992, and the Court being fully advised in the premises,

IT IS, THEREFORE, HEREBY ORDERED that the account in the name of D. Smith d/b/a Legal Research, Ltd., which received the $8,000 check from Joseph V. Libretti, Jr., the funds held by Claudia Porter, account number 429-43-221, in the name of Dee Smith d/b/a Legal Research, Ltd., at Cole Taylor Bank, 350 West Dundee, Wheeling, IL 60090, be added to the attachment to the restraining order which is attached hereto and incorporated herein by this reference and hereby restrained from transfer, alienation, or diminution.

DATED this 8th day of April, 1992.

/s/ Illegible
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

AMENDED ATTACHMENT A

A. REAL PROPERTY

All that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, located in Lot 39 of Star Valley Ranch, Plat 10, Lincoln County, Wyoming.

B. CONVEYANCES

Blue 1990 Toyota Celica GTS 2-door VIN JT2ST85N4L0035365

Silver/Maroon 1990 Chevrolet 4-wheel drive pickup with camper shell, VIN 1GCDK14KXLZ218430

C. CASH PROCEEDS

Approximately One Hundred Two Thousand Three Hundred Sixty Dollars ($102,360) in United States currency, in that such sum in aggregate was received in exchange for the distribution of controlled substances to-wit: marijuana, a Schedule I controlled substance, and cocaine, a schedule II controlled substance, and subsequently expended, spent, distributed or otherwise disposed of during the period beginning on or about January 1, 1982, and continuing to the present.

D. JEWELRY

Diamond ring given to Claudia Porter.

E. PROPERTY

1977 Windsor 14 X 70 Mobile Home VIN 3CRKFKR1HBEA, Title Nos. 04-0427637 and

04-39651 located in Green River, Wyoming and any rents or profits received thereon from this date forward.

F. BANK ACCOUNTS

1. Customer Account Number 008-666555 managed by Columbia Savings, 5850 South Ulster Circle East, Englewood, CO 80111, 303-773-3444, which consists of:

   a) IRA savings account.

2. Customer Account 60-09495, managed by Vectra Bank of Lakewood, CO 80215, 303-233-8400.

3. Customer Account 1423258, managed by State Bank of Green River, 125 W. Flaming Gorge Way, Green River, WY 82935 307-875-7930

4. Customer Account 429-43-221, in the name of Dee Smith d/b/a Legal Research, Ltd., at Cole Taylor Bank, 350 West Dundee, Wheeling, IL 60090.

G. INVESTMENTS

1. Customer Account Number 16-11524406 managed by RAF Financial Corporation, 717 17th Street, Suite 2900, Denver, CO 80202, 303-292-1400, which consists of:

   a) municipal bonds issued by Castle Pines North Net District at 9.75%

   b) municipal bonds issued by FHLM Group at 8.25%, approximately $5,166.00.

2. GNMA Customer Pool Number 002941X, certificate number 30296455F managed by Barclay's American Mortgage Corporation, 5032 Parkway

Plaza Boulevard, P.O. Box 33213, Charlotte, NC 28233, 704-357-7600.

3. GNMA Customer Pool Number 002941, certificate number 03082345SF managed by Barclay's American Mortgage Corporation, P.O. Box 31728, Charlotte, NC 28231.

4. GNMA Customer Pool Number 6994, certificate 2799045SF managed by Seattle Mortgage, 229 Queen Anne Avenue North, P.O. Box C, Seattle, WA 98109.

H. CASHIER'S CHECKS

1. First Federal Bank for Savings Cashier's Check #036886, dated November 15, 1991, in the amount of $542.

2. First Federal Bank for Savings Cashier's Check #036885, dated November 15, 1991, in the amount of $250.

3. First Federal Bank for Savings Cashier's Check #036887, dated November 15, 1991, in the amount of $2,890.

I. SAFE DEPOSIT BOX

1. Safe Deposit box number 2236 located at Countryside Bank, Countryside Court, 1190 South Elmhurst Road, Mt. Prospect, Illinois 60056, 708-593-0800.

2. Safe Deposit box number 5239 located at First Bank of Westland, 10403 West Colfax, Lakewood, Colorado 80215 303-232-3000.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

	No. 92CR0006-B
	Ct. 1: 21 U.S.C. § 846 (Conspiracy to Possess With Intent to Distribute Cocaine and Marijuana)
UNITED STATES OF AMERICA,	**Ct. 2: 18 U.S.C. § 924(c)** (Use of Firearms in Relation To a Drug Trafficking Felony)
Plaintiff,	
v.	**Ct. 3: 18 U.S.C. § 1952(a)(3)** (Interstate Travel to Facilitate Drug Dealing)
JOSEPH V. LIBRETTI JR.,	**Ct. 4: 18 U.S.C. § 922(o)(1)** (Unlawful Possession of Machine Gun)
Defendant.	**Ct. 5: 21 U.S.C. § 854** (Using Drug Proceeds to Operate a Business)
	Ct. 6: 21 U.S.C. § 848 (Continuing Criminal Enterprise)
	Cts. 7, 8: 18 U.S.C. § 1956(a)(B)(i) (Money Laundering)
	Cts. 9,10: 18 U.S.C. § 1503 (Obstruction of Justice)
	Ct. 11: 21 U.S.C. § 841(a)(1) (Possession with Intent to Distribute Cocaine)

SUPERSEDING INDICTMENT

(Filed May 22, 1992)

The Grand Jury charges that:

COUNT I

From on or about January 1, 1982, through and including on or about March 24, 1992, in the District of Wyoming and elsewhere, JOSEPH V. LIBRETTI JR. did knowingly, intentionally, and unlawfully combine, conspire, confederate, and agree together with John J. Biggs (Biggs), Brian Salvatore Urso (Urso), Daniel Dixon (Dixon), Richard David Schlosser (Schlosser), and George Richard Sabell a/k/a "Chinzo", (Sabell) and with diverse other persons both known and unknown to the Grand Jury, to commit the following offenses against the United States:

(A) To knowingly, intentionally, and unlawfully possess with intent to distribute 5 kilograms or more of mixtures or substances containing detectible amounts of cocaine, a Schedule II Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A);

(B) To knowingly, intentionally, and unlawfully distribute 5 kilograms or more of mixtures or substances containing detectible amounts of cocaine, a Schedule II Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A);

(C) To knowingly, intentionally, and unlawfully possess with intent to distribute 100 kilograms or more of mixtures or substances containing detectible amounts of

marijuana, a Schedule I Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B); and

(D) To knowingly, intentionally, and unlawfully distribute 100 kilograms or more of mixtures or substances containing detectible amounts of marijuana, a Schedule I Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B).

MANNER AND MEANS OF THE CONSPIRACY

1. It was a part of the conspiracy that, beginning on or before January of 1982, LIBRETTI became involved in the business of unlawfully selling and distributing controlled substances, including cocaine and marijuana, to various customers in and around the Denver, Colorado, metropolitan area. Over the course of the conspiracy, as described in more detail in the paragraphs to follow, LIBRETTI established a well organized and highly profitable marijuana and cocaine distribution business in which he functioned as the principal organizer, manager, and supervisor, as well as the primary source of financing through which the organization purchased and obtained the controlled substances which were ultimately distributed by LIBRETTI and other members of the conspiracy. Other members of the conspiracy, including but not limited to Biggs, Urso, Dixon, Schlosser, and Sabell, acting at LIBRETTI's direction or pursuant to his management, supervision, or control, would perform various tasks associated with the acquisition, storage, concealment, and distribution of said cocaine and marijuana, as well as the concealment and laundering of the money representing the proceeds of said illegal drug distribution business.

2. It was a further part of the conspiracy that members of the conspiracy would make arrangements for the purchase of quantities of cocaine and marijuana from various individuals, both known and unknown to the Grand Jury, who were located in Colorado, Florida, and elsewhere. On some occasions LIBRETTI would himself make the arrangements for such purchases. On other occasions one of LIBRETTI's other co-conspirators would make such arrangements while acting on behalf of, or pursuant to the direction and supervision of, LIBRETTI.

3. It was a further part of the conspiracy that, on those occasions when supplies of cocaine were to be obtained from sources in Florida, various members of the conspiracy would travel to Florida and meet with said sources at pre-arranged locations such as the parking lots of large shopping malls. On these occasions, said members of the conspiracy would accept delivery of said cocaine, which was usually in quantities of at least 2 kilograms, and then transport it via automobile or otherwise to LIBRETTI's residence in Lakewood, Colorado.

4. It was a further part of the conspiracy that, when cocaine or marijuana would be obtained from sources within Colorado, LIBRETTI or other members of the conspiracy would take delivery of said cocaine and marijuana either at the residences of said sources or at LIBRETTI's residence in Lakewood, Colorado. These sources, among whom was Sabell, would ordinarily be paid for said cocaine (which again was usually obtained in 2-kilogram quantities) and marijuana (which was obtained in multi-pound quantities) at the time of delivery, either directly by LIBRETTI or by other co-conspirators, who would pay with money provided them by

LIBRETTI. These payments would ordinarily be in amounts of between $30,000 to $35,000 per kilogram for cocaine.

5. It was a further part of the conspiracy that, during the time LIBRETTI lived in his home in Lakewood, Colorado, cocaine and marijuana obtained from both the Florida sources and the Colorado sources would be delivered to LIBRETTI's residence in Lakewood, Colorado, by Biggs, Urso, or other members of the conspiracy. Upon its arrival at LIBRETTI's Lakewood, Colorado residence, LIBRETTI, sometimes with the assistance of other co-conspirators, would weigh said cocaine and other controlled substances, sometimes conduct tests on it to determine its purity, and then repackage it for resale.

6. It was a further part of the conspiracy that, once said cocaine and other controlled substances had been weighed, tested, and repackaged, LIBRETTI, sometimes with the assistance of other co-conspirators, would transport the controlled substances from his residence in Lakewood, Colorado, to various rented storage lockers and safe deposit boxes located throughout the Denver, Colorado metropolitan area, where they would be stored, often along with thousands of dollars in cash representing the proceeds from previous sales of such controlled substances. These controlled substances would remain in said safe deposit boxes or rental storage lockers until they were needed by LIBRETTI or other members of the conspiracy for redistribution and resale to their respective customers.

7. It was a further part of the conspiracy that LIBRETTI would also utilize two large heavy duty safes

located in his Lakewood, Colorado residence for the purpose of temporarily storing quantities of controlled substances and large sums of cash.

8. It was a further part of the conspiracy that, beginning in approximately June of 1989 when LIBRETTI moved from Lakewood, Colorado, to Green River, Wyoming, and continuing on or about March 24, 1992, LIBRETTI would direct, manage, and supervise the operation of his illegal drug distribution business from his various residences in Green River, Wyoming, from his place of employment, General Chemical Corporation, Green River, Wyoming, and from various detention facilities in Wyoming and Colorado. This would, in part, be accomplished in the following manner: Utilizing telephones located at his personal residences, at his office at General Chemical, and at the detention facilities, LIBRETTI would call (or receive calls from) Biggs and Urso, one or both of whom would be living in LIBRETTI's house in Lakewood, Colorado. Utilizing previously arranged code words, LIBRETTI would then direct Biggs or Urso to go to specific pay telephones located in Lakewood, Colorado. Then, often using a pay telephone himself in order to further minimize the possibility of law enforcement interception, LIBRETTI would talk to Biggs or Urso at said previously arranged pay phones and provide them with direction and supervision concerning the acquisition and disposition of controlled substances. The codes used by LIBRETTI, Biggs, and Urso to designate specific pay telephones in Lakewood, Colorado, included "Mr. Wong's" which referred to a specific pay telephone located at the China Garden Restaurant, 2098 Youngfield, Lakewood, Colorado, and "Mr. King's"

which referred to a specific pay telephone located at the King Soopers Grocery Store, 3400 Youngfield, Lakewood, Colorado.

9. It was a further part of the conspiracy that during those times when LIBRETTI was in Green River, Wyoming, Urso would, pursuant to the direction and supervision of LIBRETTI, purchase 2-kilogram quantities of cocaine from sources located in the Denver, Colorado metropolitan area, including Sabell. These transactions would usually occur at LIBRETTI's house in Lakewood, Colorado. On these occasions, upon being advised that LIBRETTI was ready to purchase an additional supply of cocaine, Sabell would meet with his supplier and obtain, on a "front" basis, 2 kilograms of cocaine in Lakewood, Colorado, where he would deliver it to Urso. Upon receiving the cocaine from Sabell, Urso would weigh it, place it inside one of the two heavy duty safes in the lower level of LIBRETTI's residence, and then remove from the safes the cash necessary to cover the purchase of the cocaine, which money had been left in the safes for this purpose by LIBRETTI. Urso would then deliver the cash to Sabell, who, in turn, would immediately deliver it to his source, who would be waiting for Sabell at a nearby location.

10. It was a further part of the conspiracy that LIBRETTI would, on a more or less weekly basis, travel from Green River, Wyoming, to Denver, Colorado, in order to meet with various members of his drug distribution organization. During the course of these trips, LIBRETTI would examine, weigh, and repackage controlled substances previously purchased at his direction by Urso; deliver quantities of cocaine and marijuana to

other members of the conspiracy, such as Schlosser, Urso, and Dixon, for resale to their respective customers; sell quantities of cocaine or marijuana to his own customers; and receive money representing previous sales of cocaine and marijuana by his co-conspirators and by their respective customers. In making such trips to Colorado, LIBRETTI would travel both by commercial airline and his own personal vehicles.

11. It was a further part of the conspiracy that, upon receiving cocaine and marijuana from LIBRETTI, or from Urso or other members of the conspiracy at LIBRETTI's direction, other members of the conspiracy, including Dixon, Urso, Biggs and Schlosser, would arrange for the resale of said controlled substances to their respective customers. These sales would ordinarily be for between $1,200 and $1,500 per ounce for cocaine and would often be on a "front" basis, whereby the cocaine would be delivered to said customers on credit based on the understanding that when the customers had themselves resold said cocaine, they would pay the proceeds of said sales to Dixon, Urso, Biggs, Schlosser, and LIBRETTI.

12. It was a further part of the conspiracy that LIBRETTI would hoard the proceeds generated by his and his co-conspirators' sales of cocaine and marijuana in secret hiding places such as safe deposit boxes and rented public storage lockers located in and around the Denver, Colorado, metropolitan area, in Green River, Wyoming, and in various other places such as, but not limited to, Chicago, Illinois.

13. It was a further part of the conspiracy that LIBRETTI and various other members of the conspiracy,

at the direction and with the assistance of LIBRETTI, would seize personal assets of their customers who had fallen behind in paying for supplies of cocaine or marijuana previously received by said customers. These personal assets, which included automobiles and musical instruments, would either be kept by or on behalf of LIBRETTI until said customers had paid off their drug debts, or would be sold by LIBRETTI, who would, in turn, keep the proceeds of said sales to cover said drug debts.

14. It was a further part of the conspiracy that LIBRETTI would obtain special federal firearms licenses enabling him to purchase a wide variety of otherwise restricted fully automatic weapons and silencers, as well as unrestricted conventional firearms such as semi-automatic rifles and handguns, ammunition, and firearms accessories. Once the firearms licenses were obtained, LIBRETTI would establish a firearms business through which, by purchasing hundreds of thousands of dollars worth of said firearms, he would be able to conceal and launder the proceeds of the drug distribution activities. LIBRETTI would store the firearms he obtained in his Lakewood, Colorado residence, in various rental storage lockers located in Colorado and Wyoming, and in his personal residences in Green River, Wyoming.

15. It was a further part of the conspiracy that LIBRETTI would also invest proceeds from his illegal drug distribution business in new vehicles, in parcels of land located in Wyoming and elsewhere, in his Lakewood, Colorado house, and in various securities and interest-generating accounts. LIBRETTI was, on occasion, assisted in making said investments by other members of

the conspiracy located outside Wyoming and Colorado who would, at LIBRETTI's direction, make said investments in a manner calculated to conceal LIBRETTI's interest and involvement. As compensation for rendering said assistance, said co-conspirators would receive a percentage of the interest generated by said investments.

16. It was a further part of the conspiracy that, in order to prevent the Government from seizing certain assets representing the proceeds from his organization's sales of illegal drugs, LIBRETTI would cause other co-conspirators and other persons acting as his agents to effect the transfer of legal title to said assets from LIBRETTI's name to the names of either other co-conspirators, friends or various members of his family.

17. It was a further part of the conspiracy that LIBRETTI would utilize his substantial collection of machine guns, silencers, and other weapons as a means of intimidating, and enforcing discipline among, the other participants in his drug distribution organization and in order to ensure that none of said participants would inform on LIBRETTI or other members of the conspiracy to law enforcement. This intimidation would occur in a variety of ways, including LIBRETTI openly displaying and on occasion openly firing said weapons from the back of his Lakewood, Colorado home when other members of the conspiracy were present; LIBRETTI on occasion actually pointing said weapons at other members of the conspiracy while they were present in his Lakewood, Colorado home; and other members of the conspiracy threatening their customers and suggesting that harm could come to said customers through the use of LIBRETTI's firearms or otherwise in the event said

customers should inform on LIBRETTI's drug organization to law enforcement.

18. It was a further part of the conspiracy that, upon learning that they were under investigation by law enforcement agencies in connection with their drug distribution organization, LIBRETTI and various other members of the conspiracy would correspond with each other in regard to the stories they should relate to law enforcement officers in order to conceal the nature, extent, and the identity of the participants in said drug distribution organization. In addition, LIBRETTI would contact and agree to pay for attorneys to represent the interests of the other co-conspirators in connection with law enforcement investigations or prosecutions of said co-conspirators.

19. During the course of the aforesaid conspiracy, LIBRETTI, Urso, Biggs, Schlosser, Dixon, Sabell, and the other members of the conspiracy were responsible for possessing and distributing approximately 60 kilograms of cocaine and approximately 600 pounds of marijuana.

OVERT ACTS

During the course of the aforesaid conspiracy and for the purpose of accomplishing the objects thereof, the following overt acts were committed:

1. From on or about spring of 1982, up to the beginning of 1983, LIBRETTI distributed marijuana on numerous occasions in quantities of 1/4 ounce to 1/4 pound to David Michael Corson in the Denver metropolitan area.

2. From on or about January of 1983, through and including on or about August of 1985, LIBRETTI distributed about 3 ounces of cocaine per month to Craig David Juliano.

3. Between on or about January of 1984, and on or about June of 1987, LIBRETTI distributed 1/8 ounce quantities of cocaine in the Denver metropolitan area to David Michael Corson on approximately 100 occasions.

4. On or about October 10, 1985, LIBRETTI sent a cashier's check in the amount of $9,000 to his brother, William Libretti, and requested that William Libretti obtain a second cashier's check in the amount of $9,000 from Talman Home Federal Savings and Loan Association of Illinois and return it to LIBRETTI.

5. Between on or about January of 1986, and on or about January of 1990, Urso, Dixon, and other co-conspirators distributed a total of approximately 10 kilograms of cocaine in the Denver metropolitan area to Michael Patrick Carson.

6. Between on or about January of 1987, and on or about September of 1987, David Michael Corson and LIBRETTI distributed cocaine in approximately 1/8 ounce quantities in the Denver metropolitan area, to Raymond Rivera on approximately 30 occasions.

7. On or about July 31, 1987, LIBRETTI rented locker #A054 at the Public Storage Lockers, 12351 West 44th Avenue, Wheatridge, Colorado, for the purpose of storing large quantities of cocaine, marijuana, and cash proceeds from the illegal drug sales undertaken by members of the conspiracy.

8. On or about September 12, 1987, LIBRETTI possessed with the intent to distribute approximately 1 pound of cocaine and approximately 600 pounds of marijuana, together with approximately $150,000 in drug proceeds, in a storage locker in Wheatridge, Colorado.

9. Between on or about March of 1988, and on or about March of 1990, LIBRETTI entered safe deposit box #5409 at the Jefferson Bank and Trust, Lakewood, Colorado on approximately 35 occasions for the purpose of storing or retrieving controlled substances and cash proceeds representing previous sales of controlled substances.

10. Between on or about June of 1989, and on or about August of 1991, LIBRETTI made approximately 57 airline flights from either Rock Springs, Wyoming to Denver, Colorado, or from Denver, Colorado to Rock Springs, Wyoming, which trips were for the purpose of LIBRETTI's traveling to and from Denver, Colorado to manage, supervise or otherwise control his illegal drug distribution organization.

11. On or about November of 1989, in Lakewood, Colorado, LIBRETTI delivered approximately 1/2 kilogram of cocaine to Schlosser.

12. On or about February 19, 1990, LIBRETTI distributed approximately 4 ounces of cocaine to Dixon.

13. On or about February 19, 1990, in Colorado, LIBRETTI seized Dixon's title to his Porsche automobile as collateral for approximately 4 ounces of cocaine which Dixon had previously received from LIBRETTI, but for which he had not yet paid LIBRETTI.

14. On or about February 19, 1990, in Colorado, Dixon distributed approximately 4 ounces of cocaine to Michael Carson.

15. On or about July 1, 1990, LIBRETTI distributed approximately 1/8 ounce of cocaine to Kimberly Barron.

16. On or about September of 1990, in Lakewood, Colorado, Urso delivered approximately $60,000.00 cash to Sabell in exchange for approximately 2 kilograms of cocaine.

17. On or about September of 1990, in Colorado, Urso delivered approximately 3 kilograms of cocaine to Niel Rubano, in order for Rubano to store it for him.

18. On or about September of 1990, in Colorado, Urso delivered approximately 2 kilograms of cocaine to LIBRETTI.

19. On or about January 9, 1991, LIBRETTI flew via commercial airline from Rock Springs, Wyoming to Denver, Colorado for the purpose of removing controlled substances and drug proceeds from certain safe deposit boxes in order to conceal them from discovery and seizure by law enforcement agencies.

20. On or about January 9, 1991, LIBRETTI had his safe deposit box at Bank Western in Lakewood, Colorado drilled, and removed contraband, illegal drug proceeds, and other evidence in order to conceal it from discovery and seizure by law enforcement.

21. On or about July 23, 1991, LIBRETTI utilized funds derived from illegal drug proceeds to purchase a $28,900.00 cashier's check from Vectra Bank in Lakewood, Colorado.

22. On or about August 23, 1991, LIBRETTI utilized funds derived from illegal drug proceeds to purchase a $65,000.00 cashier's check from Vectra Bank in Lakewood, Colorado.

23. On or about December 4, 1991, LIBRETTI possessed approximately 2 ounces of marijuana in his personal locker at the General Chemical Corporation, Green River, Wyoming.

24. On or about December 23, 1991, LIBRETTI executed a quit claim deed which purported to transfer title to certain real estate from himself to his father, Joseph V. Libretti Sr., in order to conceal his ownership of said property and to thus prevent the United States government from discovering and seizing it as proceeds of his illegal drug distribution organization.

25. On or about December 19, 1991, LIBRETTI caused a letter to be sent to the Seattle Mortgage Company in order to attempt to cause Seattle Mortgage Company to transfer ownership of a GNMA certificate from JOSEPH V. LIBRETTI JR. to Joseph V. Libretti Sr., for the purpose of concealing LIBRETTI's ownership interest in said GNMA certificate and to thus prevent the United States government from discovering and seizing said certificate as proceeds of his illegal drug distribution organization.

26. On or about April of 1991, LIBRETTI purchased 2 green military style ammunition cans from Jax Surplus in Fort Collins, Colorado, for the express purpose of utilizing those cans to store and conceal cocaine.

27. On or about September of 1991, LIBRETTI buried the aforementioned ammunition cans near a lot he owned at the Star Valley Ranch in Thayne, Wyoming, which said cans contained approximately 1½ kilograms of cocaine.

28. On or about April 26, 1991, LIBRETTI flew from Denver, CO to Chicago, IL.

29. On or about April 27, 1991, LIBRETTI rented safe deposit box number 2236 at the Countryside Bank, 1190 South Elmhurst Road, Mount Prospect, Illinois, for the express purpose of concealing evidence of his drug trafficking organization.

30. On or about April 27, 1991, LIBRETTI placed $28,060 cash collected from illegal drug trafficking into safe deposit box number 2236 at the Countryside Bank in Mount Prospect, IL.

31. On or about December 9, 1991, LIBRETTI called Claudia Porter and told her to close out his bank accounts at the WyoChem Federal Credit Union for the express purpose of transferring and concealing evidence (drug proceeds) of his drug-trafficking organization.

32. On or about December 30, 1991, LIBRETTI sent a letter to Claudia Porter detailing how Porter should surreptitiously enter the General Chemical Plant near Green River, Wyoming, and remove cash proceeds of his drug trafficking business from a locker where he had previously hidden them.

33. On or about February 3, 1992, LIBRETTI called Claudia Porter and directed her to remove $8,000 from the account he previously had her conceal funds from,

and mail it to Legal Research Ltd. in Chicago, Illinois for the express purpose of concealing those funds from potential seizure by the government.

34. On or about March 24, 1992, LIBRETTI sent a letter to Dee Smith, manager of Legal Research Ltd., in Chicago, Illinois, requesting that Smith make a rental payment on one of the safe deposit boxes rented by LIBRETTI to conceal evidence of his drug trafficking organization.

All in violation of 21 U.S.C. § 846.

COUNT II

Between on or about January of 1984, and on or about December 4, 1991, in the District of Wyoming and elsewhere, JOSEPH V. LIBRETTI JR. did knowingly and intentionally use and carry firearms during and in relation to a drug trafficking offense, to-wit, conspiracy to possess and distribute cocaine and marijuana as alleged in Count I of this Superseding Indictment, the allegations of which are hereby re-alleged and incorporated herein by reference, in that, throughout the duration of the conspiracy described in Count I, JOSEPH V. LIBRETTI JR. used and carried multiple conventional firearms, semi-automatic rifles and handguns, fully automatic weapons, and silencers for the purposes of intimidating and enforcing and ensuring the loyalty of various other subordinate members of the conspiracy; of ensuring that persons who purchased illegal drugs from himself or from various other members of the conspiracy would not inform on the organization to law enforcement; of safeguarding and

protecting supplies of controlled substances; and of safeguarding and protecting the cash proceeds generated by the sales of said controlled substances.

In violation of 18 U.S.C. § 924(c).

COUNT III

On or about January 9, 1991, in the District of Wyoming and elsewhere, JOSEPH V. LIBRETTI JR. knowingly and intentionally traveled in interstate commerce from the state of Wyoming to the state of Colorado with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, said activity being the unlawful possession and distribution of controlled substances in violation of 21 U.S.C. §§ 841(a)(1) and 846, and thereafter, JOSEPH V. LIBRETTI JR. did perform and attempt to perform acts to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of said unlawful activity.

In violation of 18 U.S.C. § 1952(a)(3).

COUNT IV

On or about December 4, 1991, in the District of Wyoming, the defendant JOSEPH V. LIBRETTI JR. did knowingly, intentionally and unlawfully possess a machine gun, to-wit, an Actions Arms, UZI frame 9 mm model A, serial number SA 28093.

In violation of 18 U.S.C. §§ 922(o)(1).

COUNT V

Between on or about November 13, 1986, and on or about January 4, 1990, in the District of Wyoming and elsewhere, the Defendant JOSEPH V. LIBRETTI JR., having received income derived directly and indirectly from violations of 21 U.S.C. §§ 841, 846, and 848, as described in Counts I and VI of this Superseding Indictment, the allegations of each of which are hereby incorporated herein by reference, did invest directly and indirectly such income and the proceeds of such income in the establishment and operation of an enterprise, the activities of which affected interstate commerce, that is, during the time period indicated above, JOSEPH V. LIBRETTI JR. invested the income and the proceeds of income derived from his drug distribution organization as described in the above-referenced counts of this Superseding Indictment in the establishment and operation of Lakewood Firearms Supply of Lakewood, Colorado, a firearms business licensed by the United States Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms, to sell fully automatic, automatic and conventional firearms, the activities of which business were undertaken and carried out by LIBRETTI in Colorado and in the District of Wyoming.

In violation of 21 U.S.C. § 854.

COUNT VI

From on or about January 1, 1984, through and including on or about the date of the return of this Superseding Indictment, in the District of Wyoming and elsewhere, JOSEPH V. LIBRETTI JR., the Defendant

herein, did knowingly, intentionally, and unlawfully engage in a continuing criminal enterprise, in that LIBRETTI did knowingly, intentionally, and unlawfully commit the following enumerated violations of 21 U.S.C. §§ 841(a)(1), 843(b), and 846, which violations were part of a continuing series of violations of said sections undertaken by LIBRETTI, in concert with at least 5 other persons with respect to whom LIBRETTI occupied a position as organizer, supervisor, and manager, and from which continuing series of violations LIBRETTI derived substantial income and resources:

1. From on or about January of 1984, through and including the date of the return of this Superseding Indictment, in the District of Wyoming and elsewhere, LIBRETTI combined, conspired, confederated, and agreed together with diverse other persons, including John J. Biggs (Biggs), Brian Salvatore Urso (Urso), Daniel Dixon (Dixon), Richard David Schlosser (Schlosser), George Richard Sabell (Sabell), and others both known and unknown to the Grand Jury, to commit felony violations of the federal Controlled Substances Act as alleged in Count I of the Superseding Indictment, the allegations of which are hereby incorporated herein by reference, in violation of 21 U.S.C. § 846.

2. Between on or about January of 1984, and on or about August of 1985, in Colorado, LIBRETTI knowingly, intentionally, and unlawfully distributed on a monthly basis approximately 3 ounces of cocaine per month to Craig David Juliano, in violation of 21 U.S.C. § 841(a)(1).

3. Between 1986 and January of 1990, in Colorado, during and in furtherance of the illegal drug conspiracy charged in Count I of this Superseding Indictment, and during the time when LIBRETTI, Urso, and Dixon were members of said conspiracy, Dixon unlawfully distributed approximately ten (10) kilograms of cocaine to Michael Carson, in violation of 21 U.S.C. § 841(a)(1).

4. From on or about January of 1987, through on or about August of 1987, in Colorado, LIBRETTI distributed cocaine, mostly in 1/8 ounce quantities, to Raymond Rivera on approximately 15 separate occasions, in violation of 21 U.S.C. § 841(a)(1).

5. On or about July 1987, in Colorado, LIBRETTI unlawfully possessed with the intent to distribute approximately 1 pound of cocaine, in violation of 21 U.S.C. § 841(a)(1).

6. On or about July 1987, in Colorado, LIBRETTI unlawfully distributed approximately 1/8 ounce of cocaine to Raymond Rivera and Kent Palmerton, in violation of 21 U.S.C. § 841(a)(1).

7. On or about September 12, 1987, LIBRETTI possessed with the intent to distribute approximately 1 pound of cocaine and approximately 600 pounds of marijuana in a storage locker in Wheatridge, Colorado, in violation of 21 U.S.C. § 841(a)(1).

8. On or about early November of 1989, in Colorado and elsewhere, LIBRETTI possessed with the intent to distribute approximately 2 kilograms of cocaine which he had received

from Biggs, Urso, and Sabell, in violation of 21 U.S.C. § 841(a)(1).

9. On or about the latter part of November of 1989, in Colorado and elsewhere, LIBRETTI possessed with the intent to distribute approximately 2 kilograms of cocaine which he had received from Biggs, Urso, and Sabell, in violation of 21 U.S.C. § 841(a)(1).

10. On or about early December of 1989, in Colorado and elsewhere, LIBRETTI possessed with the intent to distribute approximately 2 kilograms of cocaine which he had received from Biggs, Urso, and Sabell, in violation of 21 U.S.C. § 841(a)(1).

11. On or about the latter part of December of 1989, in Colorado and elsewhere, LIBRETTI possessed with the intent to distribute approximately 2 kilograms of cocaine which he had received from Biggs, Urso, and Sabell, in violation of 21 U.S.C. § 841(a)(1).

12. On or about June 3, 1989, LIBRETTI, for the purpose of facilitating the illegal drug conspiracy charged in Count I of this Superseding Indictment, unlawfully caused the use of a communication facility, in that LIBRETTI caused a person in Chicago, Illinois to mail to him, via United States Postal Service, a bank check in the amount of $10,000.00, which amount represented the proceeds from previous illegal sales of controlled substances, in violation of 21 U.S.C. § 843(b) and 18 U.S.C. § 2.

13. On or about July 5, 1989, LIBRETTI, for the purpose of facilitating the illegal drug conspiracy charged in Count I of this Superseding

Indictment, unlawfully caused the use of a communication facility, in that LIBRETTI caused a person in Chicago, Illinois to mail to him, via United States Postal Service, a personal check in the amount of $11,000.00, which amount represented the proceeds from previous illegal sales of controlled substances, in violation of 21 U.S.C. § 843(b) and 18 U.S.C. § 2.

14. On or about early January of 1990, in Colorado and elsewhere, LIBRETTI possessed with the intent to distribute approximately 2 kilograms of cocaine which he had received from Biggs, Urso, and Sabell, in violation of 21 U.S.C. § 841(a)(1).

15. On or about the latter part of January of 1990, in Colorado and elsewhere, LIBRETTI possessed with the intent to distribute approximately 2 kilograms of cocaine which he had received from Biggs, Urso, and Sabell, in violation of 21 U.S.C. § 841(a)(1).

16. On or about September of 1990, in Colorado and elsewhere, LIBRETTI possessed with the intent to distribute approximately 2 kilograms of cocaine which he had received from Urso, Sabell, and Niel Rubano, in violation of 21 U.S.C. § 841(a)(1).

17. On or about September 24, 1990, in the District of Wyoming and elsewhere, LIBRETTI, for the purpose of facilitating the illegal drug conspiracy charged in Count I of this Superseding Indictment, unlawfully used a communication facility, in that LIBRETTI utilized a telephone to communicate details of the illegal drug conspiracy by calling Urso at the King Soopers Grocery Store pay telephone in Wheatridge, Colorado, in violation of 21 U.S.C. § 843(b).

18. On or about September 24, 1990, at approximately 12:14 p.m., in the District of Wyoming and elsewhere, LIBRETTI, for the purpose of facilitating the illegal drug conspiracy charged in Count I of this Superseding Indictment, unlawfully used a communication facility in that LIBRETTI utilized a telephone to communicate details of the illegal drug conspiracy by calling Urso at the China Garden Restaurant pay telephone in Lakewood, Colorado, in violation of 21 U.S.C. § 843(b).

19. On or about September 24, 1990, at approximately 5:05 p.m., in the District of Wyoming and elsewhere, LIBRETTI, for the purpose of facilitating the illegal drug conspiracy charged in Count I of this Superseding Indictment, unlawfully used a communication facility in that LIBRETTI utilized a telephone to communicate details of the illegal drug conspiracy by calling Urso at the China Garden Restaurant pay telephone in Lakewood, Colorado, in violation of 21 U.S.C. § 843(b).

20. On or about November 29, 1990, in the District of Wyoming and elsewhere, LIBRETTI, for the purpose of facilitating the illegal drug conspiracy charged in Count I of this Superseding Indictment, unlawfully used a communication facility in that LIBRETTI utilized a telephone to communicate details of the illegal drug conspiracy by calling Urso at the China Garden Restaurant pay telephone in Lakewood, Colorado, in violation of 21 U.S.C. § 843(b).

21. On or about November 30, 1990, in the District of Wyoming and elsewhere, LIBRETTI, for the purpose of facilitating the illegal drug conspiracy charge in Count I of this Superseding Indictment, unlawfully used a communication facility, in that LIBRETTI utilized a telephone to communicate details of the illegal drug conspiracy by calling Urso at the China Garden Restaurant pay telephone in Lakewood, Colorado, in violation of 21 U.S.C. § 843(b).

22. On or about March 8, 1990, at 9:11 p.m. in the District of Wyoming and elsewhere, LIBRETTI, for the purpose of facilitating the illegal drug conspiracy charged in Count I of this Superseding Indictment, unlawfully used a communication facility, in that LIBRETTI utilized a telephone to communicate details of the illegal drug conspiracy by calling an unidentified co-conspirator at the King Soopers Grocery Store pay telephone in Wheatridge, Colorado, in violation of 21 U.S.C. § 843(b).

23. On or about March 8, 1990, at 10:11 p.m. in the District of Wyoming and elsewhere, LIBRETTI, for the purpose of facilitating the illegal drug conspiracy charged in Count I of this Superseding Indictment, unlawfully used a communication facility, in that LIBRETTI utilized a telephone to communicate details of the illegal drug conspiracy by calling an unidentified co-conspirator at the King Soopers Grocery Store pay telephone in Wheatridge, Colorado, in violation of 21 U.S.C. § 843(b).

24. On or about August 21, 1991, in the District of Wyoming and elsewhere, LIBRETTI, for the purpose of facilitating the illegal drug

conspiracy identified in Count I of this Superseding Indictment, unlawfully used a communication facility to send a letter to Urso by way of the United States Postal Service, which letter detailed how Urso should deny and disclaim to investigating law enforcement authorities their (LIBRETTI's and Urso's) personal association and their illegal agreement with respect to the conspiracy charged in Count I of this Superseding Indictment, in violation of 21 U.S.C. § 843(b).

25. On or about September 4, 1991, in the District of Wyoming and elsewhere, LIBRETTI, for the purpose of facilitating the illegal drug conspiracy charged in Count I of this Superseding Indictment, unlawfully used a communication facility to send a letter to Urso by way of Federal Express overnight package service. Said letter was sent by LIBRETTI to Urso under the pretense that the letter was from an attorney in Cheyenne, Wyoming, and included information on how Urso could testify at the grand jury investigating LIBRETTI and Urso, their personal partnership, and their illegal agreement with respect to the illegal drug conspiracy charged in Count I of this Superseding Indictment, in violation of 21 U.S.C. § 843(b).

26. From on or about January 9 of 1991 and through and including March 31, 1992, LIBRETTI, possessed with intent to distribute approximately two kilograms of cocaine, most of which LIBRETTI ultimately buried near property he owned near Thayne, Wyoming, in violation of 21 U.S.C. 841(a)(1).

All of which is in violation of 21 U.S.C. § 848.

FORFEITURE

Upon the conviction of the Defendant, JOSEPH V. LIBRETTI JR., for engaging in a continuing criminal enterprise as charged in this Count, in violation of 21 U.S.C. § 848, the United States is entitled to forfeiture of all property of any kind constituting or derived from proceeds LIBRETTI obtained directly and indirectly by engaging in said continuing criminal enterprise; all property of any kind which was used and intended for use in any manner or part to commit or to facilitate the commission of this continuing criminal enterprise including but not limited to the following:

1. **REAL PROPERTY**

All that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, located in Lot 39 of Star Valley Ranch, Plat 10, Lincoln County, Wyoming.

2. **CONVEYANCES**

Blue 1990 Toyota Celica GTS 2-dr VIN JT2ST85N4L0035365 Silver/Maroon 1990 Chevrolet 4-wheel drive pickup with camper shell, VIN lGCDK14KXLZ218430.

3. **CASH PROCEEDS**

Approximately $102,360 00 in United States currency, in that such sum in aggregate was received in exchange for the distribution of controlled substances to wit: marijuana, a Schedule I controlled substance and cocaine, a

Schedule II controlled substance, and subsequently expended, spent, distributed or otherwise disposed of during the period beginning on or about January 1, 1982, and continuing to the present.

Approximately $12,000.00 cash which JOSEPH V. LIBRETTI JR. stored inside a paint can at his and Claudia Porter's house, 500 Monroe Avenue, #50, Green River, Wyoming 82935, $5,100.00 of which was recovered from Porter on April 22, 1992.

Approximately $7,635.00 sent to Dee Smith, d/b/a Legal Research, Ltd., 2314 North Campbell Street, Chicago, Illinois 60747, from or on behalf of JOSEPH V. LIBRETTI JR.

4. **CURRENCY AND JEWELRY**

Diamond ring and wedding band set given to Claudia Porter.

All United States currency and travelers checks recovered from the storage lockers, home, person, gun safes, lockers at LIBRETTI's work location, and LIBRETTI's person.

5. **PROPERTY**

1977 Windsor 14 x 70 Mobile Home VIN 3CRKFKR1HBEA, Title Nos. 04-0428638 and 04-39651 located in Green River, Wyoming and any rents or profits received thereon from this date forward.

MacIntosh Computer System, Model SE, Serial No. F833A, DYM5011, and Imagewriter II printer, Serial No. 1567975, complete with all accessories and disks.

6. BANK ACCOUNTS

Customer Account Number 008-666555 managed by Columbia Savings, 5850 South Ulster Circle East, Englewood, Colorado 80111, 303-773-3444, which consists of an IRA savings account.

Customer Account 60-09495, managed by Vectra Bank of Lakewood, Colorado 80215, 303-233-8400.

Customer Account 1423258, managed by State Bank of Green River, 125 W. Flaming Gorge Way, Green River, Wyoming 82935, 307875-7930.

Customer Account 429-43-221, in the name of Dee Smith d/b/a Legal Research, Ltd., at Cole Taylor Bank, 350 West Dundee, Wheeling, Illinois 60090.

7. INVESTMENTS

GNMA Certificate Number 2799045SF in the name of JOSEPH V. LIBRETTI, investor number 00006994, pool number 002941, disbursed by Seattle Mortgage Company, 229 Queen Anne Avenue North, Seattle, Washington 98109.

GNMA Certificate Number 03082345SF in the name of JOE LIBRETTI, pool number 002941, disbursed by Barclays American Mortgage Corporation, P. O. Box 31728, Charlotte, North Carolina 28231.

Customer Account Number 16-11524406 managed by RAF Financial Corporation, 717 17th Street, Suite 2900, Denver, Colorado 80202, 303-292-1400, which consists of:

a) municipal bonds issued by Castle Pines North Net District at 9.75%;

b) municipal bonds issued by FHLM Group at 8.25%.

8. ADDITIONAL CASHIER'S CHECKS

First Federal Bank for Savings Cashier's Check #036886, dated November 15, 1991, in the amount of $542.

First Federal Bank for Savings Cashier's Check #036885, dated November 15, 1991, in the amount of $250.

First Federal Bank for Savings Cashier's Check #036887, dated November 15, 1991, in the amount of $2,890.

9. CONTENTS OF SAFE DEPOSIT BOXES

Safe Deposit box number 2236 located at Countryside Bank, Countryside Court, 1190 South Elmhurst Road, Mt. Prospect, Illinois 60056, 708-593-0800.

Safe Deposit box number 5239 located at First Bank of Westland, 10403 West Colfax, Lakewood, Colorado 80215 303-232-3000.

All of which is in violation of 21 U.S.C. § 848 and for which forfeiture is provided in 21 U.S.C. § 853.

COUNT VII

On or about June 3, 1989, in the District of Wyoming and elsewhere, JOSEPH V. LIBRETTI JR., did knowingly and willfully cause his brother, William Richard Libretti, to conduct a financial transaction affecting interstate commerce and involving the proceeds of a specified unlawful activity, that is, the unlawful possession and distribution of controlled substances in violation of 21 U.S.C. §§ 841(a)(1) and 846, with the knowledge that the property involved in said financial transaction in fact represented the proceeds of said specified unlawful activity, and with the knowledge that said transaction was designed in whole or in part to conceal and disguise the nature, the location, the source, the ownership and control of the proceeds of said unlawful activity, to-wit, that on or about June 3, 1989, LIBRETTI caused his brother, William Richard Libretti, to purchase a bank check in the amount of $10,000.00 from the First Nationwide Bank of Chicago, Illinois, an institution whose activities affect interstate commerce, using proceeds from previous sales of cocaine and marijuana by LIBRETTI's drug distribution organization, and, following the purchase of said bank check, William Richard Libretti, acting pursuant to LIBRETTI's direction, mailed said bank check to LIBRETTI in Green River, Wyoming, via the U. S. Postal Service.

In violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 2(b).

COUNT VIII

On or about July 5, 1989, in the District of Wyoming and elsewhere, JOSEPH V. LIBRETTI JR., did knowingly

and willfully cause his brother, William Richard Libretti, to conduct a financial transaction affecting interstate commerce and involving the proceeds of a specified unlawful activity, that is, the unlawful possession and distribution of controlled substances in violation of 21 U.S.C. §§ 841(a)(1) and 846, with the knowledge that the property involved in said financial transaction in fact represented the proceeds of said specified unlawful activity, and with the knowledge that said transaction was designed in whole or in part to conceal and disguise the nature, the location, the source, the ownership and control of the proceeds of said unlawful activity, to-wit, on or about July 5, 1989, LIBRETTI caused his brother, William Richard Libretti, to draw a personal check in the amount of $11,000.00 on an account in his (William Richard Libretti's) name at the Cragin Federal Bank for Savings of Chicago, Illinois, an institution whose activities affect interstate commerce, the funds of which account represented the proceeds from previous sales of cocaine and marijuana by LIBRETTI's drug distribution organization, and, likewise acting pursuant to LIBRETTI's direction, William Richard Libretti thereafter mailed said personal check to LIBRETTI in Green River, Wyoming via the U.S. Postal Service.

In violation of 18 U.S.C. §§ 1956(a)(1)(B)(i) and 2(b).

COUNT IX

On or about November 21, 1991, in the District of Wyoming, the Defendant, JOSEPH V. LIBRETTI JR., did corruptly endeavor to obstruct, and impede the due administration of justice in regard to a federal Grand Jury

in the District of Wyoming, in that, on or about the above specified date, LIBRETTI gave disguised and misleading handwriting exemplars of his signature and handwriting in response to a federal grand jury subpoena.

In violation of 18 U.S.C. § 1503.

COUNT X

Between on or about August 21, 1991, and through and including September 3, 1991, in the District of Wyoming and elsewhere, the Defendant, JOSEPH V. LIBRETTI JR., did corruptly endeavor to influence, obstruct, and impede the due administration of justice in regard to a federal Grand Jury in the District of Wyoming, in that LIBRETTI, on or about the above specified dates, directed Brian Salvatore Urso to provide false information in connection with a federal Grand Jury investigation into the facts and circumstances relating to the charges set forth in Counts I and VI of this Superseding Indictment.

In violation of 18 U.S.C. § 1503.

COUNT XI

Between on or about April, 1991, and through and including on or about March 31, 1992, in the District of Wyoming and elsewhere, the Defendant JOSEPH V. LIBRETTI JR., did knowingly, unlawfully, and intentionally possess with intent to distribute approximately 1.6 kilograms of cocaine, a schedule II controlled substance;

In violation of 21 U.S.C. § 841(a)(1).

A TRUE BILL

/s/ Jinneta Cook
Foreperson

/s/ Richard A. Stacy/HP
RICHARD A. STACY
United States Attorney

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

(Caption Omitted In Printing)

BILL OF PARTICULARS AND SECOND MOTION TO AMEND ATTACHMENT A TO THE RESTRAINING ORDER ISSUED BY THE COURT ON APRIL 2, 1992

(Filed Sep. 15, 1992)

COMES NOW the United States of America, by and through Gay Woodhouse, Assistant United States Attorney for the District of Wyoming, and moves that the attachment to the Restraining Order be amended to include two properties owned jointly by Joseph V. Libretti Jr. and Claude J. Cismaru and to include the funds transferred to others to conceal it from forfeiture described below:

1. It has come to the attention of the United States that the equity position of Joseph v. Libretti Jr. has increased dramatically in the following properties which are owned by him jointly with Claude J. Cismaru and which properties were purchased with proceeds of drug activities engaged in by the Defendant:

a. A condominium located at 9430 West Ontario Drive, Littleton, Colorado 80123, more particularly described as follows: Lot 28, Block 2, Dutch Ridge Subdivision Filing #2, Jefferson County, Colorado.

b. A condominium located at 9328 West Ontario Drive, Littleton, Colorado 80123, more particularly

described as follows: Lot 133, Block 1, Dutch Ridge Subdivision Filing #1, Exemption Survey #1, Jefferson County, Colorado.

2. Because of a substantial increase in equity in these condominiums and the fact that the transfer of such properties would net a profit to the Defendant, they should be subject to the Restraining Order and added to Attachment A thereto.

WHEREFORE, the United States prays that the attachment to the Restraining Order issued on April 2, 1992, be amended to include the above-described real property.

DATED this 14th day of September, 1992.

Respectfully submitted,

RICHARD A. STACY
United States Attorney

By: /s/ Gay Woodhouse
GAY WOODHOUSE
Assistant United States Attorney

(Certificate Of Service Omitted In Printing)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

(Caption Omitted In Printing)

ORDER GRANTING UNITED STATES' SECOND MOTION TO AMEND RESTRAINING ORDER ATTACHMENT A

(Filed Sep. 15, 1992)

This matter having come before the Court upon the motion of the United States of America to amend the attachment to the Restraining Order entered on April 2, 1992, and the Court being fully advised in the premises,

IT IS, THEREFORE, HEREBY ORDERED that the following-described properties and funds:

a. All that lot or parcel of land, together with its building improvements, fixtures, attachments and easements, located at 9430 West Ontario Drive, Littleton, Colorado 80123, more particularly described as follows: Lot 28, Block 2, Dutch Ridge Subdivision Filing #2, Jefferson County, Colorado.

b. All that lot or parcel of land, together with its building improvements, fixtures, attachments and easements, located at 9328 West Ontario Drive, Littleton, Colorado 80123, more particularly described as follows: Lot 133, Block 1, Dutch Ridge Subdivision Filing #1, Exemption Survey #1, Jefferson County, Colorado.

DATED this 15th day of September, 1992.

/s/ Illegible
UNITED STATES
DISTRICT COURT JUDGE

AMENDED ATTACHMENT A

A. REAL PROPERTY

1. All that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, located in Lot 39 of Star Valley Ranch, Plat 10, Lincoln County, Wyoming.

2. All that lot or parcel of land, together with its building improvements, fixtures, attachments and easements, located at 9430 West Ontario Drive, Littleton, Colorado 80123, more particularly described as follows: Lot 28, Block 2, Dutch Ridge Subdivision Filing #2, Jefferson County, Colorado.

3. All that lot or parcel of land, together with its building improvements, fixtures, attachments and easements, located at 9328 West Ontario Drive, Littleton, Colorado 80123, more particularly described as follows: Lot 133, Block 1, Dutch Ridge Subdivision Filing #1, Exemption Survey #1, Jefferson County, Colorado.

B. CONVEYANCES

Blue 1990 Toyota Celica GTS 2-door VIN JT2ST85N4L0035365

Silver/Maroon 1990 Chevrolet 4-wheel drive pickup with camper shell, VIN 1GCDK14KXLZ218430

C. CASH PROCEEDS

Approximatelly [sic] One Hundred Two Thousand Three Hundred Sixty Dollars ($102,360) in United States currency, in that

such sum in aggregate was received in exchange for the distribution of controlled substances to-wit: marijuana, a Schedule I controlled substance, and cocaine, a schedule II controlled substance, and subsequently expended, spent, distributed or otherwise disposed of during the period beginning on or about January 1, 1982, and continuing to the present.

D. JEWELRY

Diamond ring given to Claudia Porter.

E. PROPERTY

1977 Windsor 14 X 70 Mobile Home VIN 3CRKFKR1HBEA, Title Nos. 04-0427637 and 04-39651 located in Green River, Wyoming and any rents or profits received thereon from this date forward.

F. BANK ACCOUNTS

1. Customer Account Number 008-666555 managed by Columbia Savings, 5850 South Ulster Circle East, Englewood, CO 80111, 303-773-3444, which consists of:

   a) IRA savings account.

2. Customer Account 60-09495, managed by Vectra Bank of Lakewood, CO 80215, 303-233-8400.

3. Customer Account 1423258, managed by State Bank of Green River, 125 W. Flaming Gorge Way, Green River, WY 82935, 307-875-7930

4. Customer account number 429-43-221, in the name of Dee Smith d/b/a Legal Research,

Ltd., at Cole Taylor Bank, 350 West Dundee, Wheeling, IL 60090.

G. INVESTMENTS

1. Customer Account Number 16-11524406 managed by RAF Financial Corporation, 717 17th Street, Suite 2900, Denver, CO 80202, 303-292-1400, which consists of:

   a) municipal bonds issued by Castle Pines North Net District at 9.75%

   b) municipal bonds issued by FHLM Group at 8.25% approximately $5,166.00.

2. GNMA Customer Pool Number 002941X, certificate number 30296455F managed by Barclay's American Mortgage Corporation, 5032 Parkway Plaza Boulevard, P.O. Box 33213, Charlotte, NC 28233, 704-357-7600.

3. GNMA Customer Pool Number 002941, certificate number 03082345SF managed by Barclay's American Mortgage Corporation, P.O. Box 31728, Charlotte, NC 28231.

4. GNMA Customer Pool Number 6994, certificate 2799045SF managed by Seattle Mortgage, 229 Queen Anne Avenue North, P.O. Box C, Seattle, WA 98109.

H. CASHIER'S CHECKS

1. First Federal Bank for Savings Cashier's Check #036886, dated November 15, 1991, in the amount of $542.

2. First Federal Bank for Savings Cashier's Check #036885, dated November 15, 1991, in the amount of $250.

3. First Federal Bank for Savings Cashier's Check #036887, dated November 15, 1991, in the amount of $2,890.

I. SAFE DEPOSIT BOX

1. Safe Deposit box number 2236 located at Countryside Bank, Countryside Court, 1190 South Elmhurst Road, Mt. Prospect, Illinois 60056, 708-593-0800.

2. Safe Deposit box number 5239 located at First Bank of Westland, 10403 West Colfax, Lakewood, Colorado 80215 303-232-3000.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

(Caption Omitted In Printing)

Count(s): VI of the Indictment
21 U.S.C. § 848
Class: Felony
Penalty:
20 mandatory minimum to life confinement
$2,000,000 fine, $50 special assessment
and forfeiture prescribed in
21 U.S.C. § 853
(fine)
N/A
(total restitution)

PLEA AGREEMENT

(Filed Oct. 6, 1992)

United States of America, by and through Gay Woodhouse, Assistant United States Attorney for the District of Wyoming, and Defendant, JOSEPH V. LIBRETTI, JR., personally and by his attorney, Craig, L. Truman, submit the following plea agreement and stipulation of facts:

1. The Defendant agrees to plead guilty to engaging in a continuing criminal enterprise in Count Six of the Indictment charging a violation of 21 U.S.C. § 848.

2. The maximum statutory penalty for the offense is life imprisonment, not more than a $2,000,000.00 fine, or both, a $50.00 mandatory special assessment, and forfeiture of all known assets as prescribed in 21 U.S.C. § 853 and assets which are discovered at any later time up to $1,500,000.

3. The Defendant acknowledges that by pleading guilty to Count Six of the Indictment, he waives various constitutional rights, including the right to a jury trial and a speedy trial.

4. The Defendant further acknowledges that he has read this Plea Agreement and the Indictment, setting forth the aforementioned charges against him, that these charges have been fully and carefully explained to him by his attorney, and that he fully understands both the nature and the elements of the crimes for which he has been charged, and the maximum and minimum penalties to which he could be subjected in the event he is ultimately convicted on said charges.

5. The Defendant agrees to give the Court a complete, truthful and factual basis for the entry of his guilty plea.

6. The United States agrees that no additional charges arising from these incidents or for any violation of the law now presently known to the United States will be filed in the District of Wyoming.

7. The United States agrees to recommend at the time of sentencing that the Defendant receive not more than the mandatory minimum sentence of 20 years as required by 21 U.S.C. § 848.

8. The Defendant agrees to pay the special assessment amount of $50.00 at the time of sentencing.

9. Defendant agrees to identify all assets that were used to facilitate his criminal activity. Defendant further agrees that he will provide complete financial disclosure

forms requiring the listing of assets and financial interests.

10. The defendant agrees to transfer his right, title, and interest in all of his assets to the Division of Criminal Investigation of the Wyoming Attorney General including, but not limited to: all real estate; all personal property, including guns, the computer, and every other item now in the possession of the United States; all bank accounts, investments, retirement accounts, cash, cashier's checks, travelers checks and funds of any kind.

11. The parties understand that the sentencing judge is neither a party to nor bound by this plea agreement and is free to impose whatever sentence he feels is justified.

12. Nothing in this agreement shall limit the United States in its comments in and responses to any sentencing and post-sentencing matters.

13. The Defendant agrees that he is pleading guilty because he is, in fact, guilty and not for the purpose of delay or to protect business associates or family members. In addition, the Defendant agrees not to attempt to withdraw his plea of guilty under any circumstances and that there are no reasons which support a withdrawal of his guilty plea.

14. It is agreed that no additional promises, agreements, and conditions have been entered into other than those set forth in this document and none will be entered into unless in writing and signed by all parties.

15. The defendant has been advised of § 1B1.3 of the Sentencing Guidelines regarding the use of relevant conduct and establishing sentence and has read the advisement regarding supervised release attached to this statement.

Dated this 5th day of October, 1992.

/s/ Joseph V. Libretti, Jr.
JOSEPH V. LIBRETTI, JR.
Defendant

/s/ Craig L. Truman
CRAIG L. TRUMAN
Attorney for Defendant

/s/ Gay Woodhouse
GAY WOODHOUSE
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA,	)	
Plaintiff	)	
V.	)	No. 92CR0006B
JOSEPH V. LIBRETTI, JR.,	)	
Defendant.	)	

Notice to Defendant regarding supervised release: Guideline sentencing requires a term of supervised release in connection with a sentence to confinement of

more than one (1) year, and the Court may impose supervised release in any other case.

Supervised release will follow the term of confinement, may be for any term of years and, if justified by the Court, may be for the balance of the Defendant's life. Violation of supervised release may result in confinement for the term of years imposed on supervised release which would be in addition to time previously served in connection with the original offense, with no credit given for the time spent on supervision.

5D3-1 - 5D3.2 - 5D3.3 - 7A1.3 - 7A1.4(b)

18 U.S.C. § 3583

/s/ Joseph V. Libretti, Jr.
JOSEPH V. LIBRETTI, JR.
Defendant

/s/ Craig L. Truman
CRAIG L. TRUMAN
Attorney for Defendant

/s/ Gay Woodhouse
GAY WOODHOUSE
Assistant United States Attorney
Attorney for the Government

[TRANSCRIPT OF PROCEEDINGS, CHANGE OF PLEA]

[3] PROCEEDINGS

(Change of plea proceedings

commenced 10:41 a.m., October 5, 1992.)

THE COURT: Good morning, ladies and gentlemen.

MS. WOODHOUSE: Good morning, Your Honor.

THE COURT: At this time do you care to report to the Court the status of this matter?

MS. WOODHOUSE: Yes, I do, Your Honor. The United States and the defendant have entered into a plea agreement in this matter. This essentially is a change of plea hearing. The plea agreement basically provides that the defendant Joseph E. Libretti, Jr. will plead guilty to Count 6 of the Indictment which alleges a violation of 21 USC Section 848, which is engaging in a continuing criminal enterprise in connection with drug distribution network. It carries a penalty of a 20-year mandatory minimum sentence to life confinement, a $2 million fine, a $50 special assessment and forfeiture as prescribed in 21 USC Section 853.

The defendant has agreed to plead guilty to Count 6. He has also agreed to forfeit all the property now in the custody of the United States, to report to us additional property which we may not know about and to forfeit that property as well and to transfer it by virtue of his plea on the record here today.

[4] The United States has agreed that we will recommend that the defendant receive not more than the mandatory minimum sentence of 20 years as required by 21 USC Section 848.

We are ready to proceed, Your Honor.

THE COURT: Very well.

MS. WOODHOUSE: Your Honor, we will also dismissal the remaining counts at the time of sentencing.

THE COURT: Very well. Now, Mr. Truman, you've heard the prosecutor's recitation of the terms of the plea agreement. Is that substantially correct from your standpoint?

MR. TRUMAN: That is correct, Your Honor. I would only advise the Court of one or two other matters.

THE COURT: What is that.

MR. TRUMAN: There is now pending against Mr. Libretti in the District of Colorado a silencer count. This Court nor this United States Attorney has any power over that. However, I've been informed recently by Assistant Public Defender Rick Williamson of the District of Colorado that Assistant United States Attorney George Buck has indicated to him that they will be dismissing that count.

I want the Court to know that that has been contemplated. It's not part of the plea agreement, but I [5] think in the terms of completeness, the Court should know that is also in the circumstances. Otherwise, Your Honor, that which the government has said is substantially our plea agreement.

THE COURT: I think that is probably correct. I think we're all aware of the fact that the United States Attorney of the District of Colorado is somewhat independent, at least as far as Congress is concerned, and I'm not sure that he would necessarily recognize the recommendations of the United States Attorney for the District of Wyoming, but they can recommend dismissal. Is that your position?

MS. WOODHOUSE: Yes, Your Honor.

THE COURT: Very well. Now, Mr. Libretti, you appear before me for the purposes of a change of plea. And before we go further with the change of plea, I must remind you of your constitutional rights that I'm sure you're aware of, but I'll recite them for the benefit of the record.

First, you have a right to a speedy and public jury trial, which we're in the middle of. You have a right to be presumed to be innocent at that trial, and this presumption of innocence will stay with you to the very end of the trial.

The United States is required to prove its case [6] against you by proof beyond a reasonable doubt, and if you or your attorneys feel that the case has not in any way been proved against you beyond a reasonable doubt, you're entitled to be acquitted by a motion at the end of the government's case. Obviously, the Court would have to rule on that at that time.

You have confronted many of the witnesses against you, and you're entitled to confront the rest of them against you. And by that I mean to see them, to hear

them, to have Mr. Truman or Mrs. Miller cross-examine them.

In addition to that, you're, of course, entitled to your own witnesses, and you can have subpoenaed any witnesses that you want or any evidentiary exhibits that you want. And the aim and object of all of this is that this jury that has been presently selected can decide as fairly as we can have them do it your guilt or innocence.

Now, if you plead guilty, it's going to be the end of this trial. We're not going to go through with this until the end of this week, or next weeks, and the jury is not going to decide whether you're guilty or not. I'll dismiss them after this, and that will be that. You'll have to be then interviewed by the probation office. Mr. Bonham is here, our chief probation officer in court. And the interview will be arranged and then a presentence report, which will probably consist of 20 or more [7] single-spaced typewritten pages, takes about a month to prepare one of those.

The probation office checks with everybody and doesn't leave a stone unturned. Our probation office is, I think, the best in this circuit, and probably one of the best in the United States.

You and Mr. Truman will have the opportunity to review that to be sure that it's substantially correct, and you'll have an opportunity to file objections to it, which I'll hear at the time of sentencing, but you will not have a continuing trial. You'll just be brought back for purposes of sentencing.

And I think you heard Mrs. Woodhouse tell you what the minimum sentences are, the consequences of your plea. These include a minimum sentence of 20 years, and it could be until life. In addition to that, you could be fined $2 million and be required to pay a special assessment of $50, but all the property that's described in this Count 6 could be forfeited to the United States. So, obviously, the consequences of this are very serious.

Do you feel you understand the consequences of it?

THE DEFENDANT: There is only one part I didn't understand. They said that they can take up to one and a half million dollars from me any time. Let's say 20 years [8] from now I get a job, I get a paycheck. They can come and take that?

MR. TRUMAN: Your Honor, may I speak to that?

THE COURT: Yes.

MR. TRUMAN: The purpose, as I understand of that circumstance, is that Mr. Libretti is going to tell us under oath that all the assets that he has have now been made known to the government. The reason for that clause was that if in the next couple of years should a safety deposit box with assets that Mr. Libretti –

THE COURT: Swiss bank account or something that became known.

MR. TRUMAN: Prior to today's date become known, that the government may seize that.

THE COURT: Yeah.

MR. TRUMAN: Your Honor, I think it is fair to state from this date forward that Mr. Libretti earns it, if it's earned in a lawful manner.

THE COURT: I think 20 years from now should you have an inheritance from your family that is not drug tainted, and I think that property would be free of forfeiture. But I think that as Mr. Truman says, if something came to light that you had a secret bank account on the Caymen Islands or in Panama or Switzerland or someplace like that and you got the money back into this [9] country, I think they could go after that and forfeit it. I believe that's what it is.

As I understand it, I think it has to be the product of a drug transaction to be forfeited. Isn't that your understanding, Mr. Truman?

MR. TRUMAN: That's my understanding.

THE COURT: Yes. I think that's correct. Well, now, Mr. Libretti, there is one other understanding that I've got to make you understand and that is if you plead guilty, I'm going to have to place you under oath, and I will have to question you as to whether or not your guilty plea is a voluntary plea and whether or not there's a factual basis for the plea.

Now, under the Fifth Amendment to the Constitution, you have a right to remain silent, having been accused of crime, and nobody can force you to plead guilty. However, if you choose to stand on your right, I, of course, won't be able to take your plea and then we'll go forward with the trial and I'll call the jury back in and we'll start where we left off.

So I want to be sure, do you understand these rights?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about them?

THE DEFENDANT: No.

[10] THE COURT: Are you ready, then, to plead to this Indictment?

THE DEFENDANT: Okay.

THE COURT: Mr. Truman, is there any reason why you're client should not?

MR. TRUMAN: I know of no such reason.

THE COURT: Very well. Joseph V. Libretti, Jr., Count 6 of the Indictment – of the Superceding [sic] Indictment charges from on or about January 1, 1984, through and including on or about the date of the return of this Superceding [sic] Indictment, in the District of Wyoming and elsewhere, Joseph V. Libretti, Jr., the defendant herein, did knowingly, intentionally and unlawfully engage in a continuing criminal enterprise in that Libretti did knowingly, intentionally and unlawfully commit the following enumerated violations of 21 United States Code Section 841(a)(1), Section 843(b) and Section 846, which violations were part of a continuing series of violations of said sections undertaken by Libretti in concert with at least five other persons with respect to whom Libretti occupied a position as organizer, supervisor and manager, and from which continuing series of violations Libretti derived substantial income and resources:

Subparagraph 1. From on or about January of 1984, through and including the date of the return of this [11] Superceding [sic] Indictment, in the District of Wyoming and elsewhere, Libretti combined, conspired, confederated and agreed together with diverse other persons, including John J. Biggs, Brian Salvatore Urso, Daniel Dixon, Richard David Schlosser, George Richard Sabell, and others known and unknown to the grand jury, to commit felony violations of the federal Controlled Substances Act as alleged in Count 1 of the Superceding [sic] Indictment, the allegations of which are hereby incorporated herein by reference, in violation of 21 United States Code Section 846.

846 is the conspiracy statute.

Two. Between on or about January of 1984 and on or about August of 1985, in Colorado, Libretti knowingly, intentionally and unlawfully distributed drugs on a monthly basis approximately three ounces of cocaine per month to Craig David Juliano, in violation of 21 US Code Section 841(a)(1).

Three. Between 1986 and January 1990, in Colorado, during and in furtherance of the illegal drug conspiracy charged in Count 1 of this Superceding [sic] Indictment, and during the time when Libretti, Urso and Dixon were members of said conspiracy, Dixon unlawfully distributed approximately ten kilograms of cocaine to Michael Carson, in violation of 21 US Code Section 841(a)(1).

[12] Four. From on or about January 1987, through on or about August 1987, in Colorado, Libretti distributed

cocaine, mostly in one-eighth ounce quantities, to Raymond Rivera on approximately 15 separate occasions, in violation of 21 US Code Section 841(a)(1).

Five. On or about July 1987, in Colorado, Libretti unlawfully possessed with intent to distribute approximately one pound of cocaine, in violation of 21 US Code Section 841(a)(1).

Six. On or about July 1987, in Colorado, Libretti unlawfully distributed approximately one- eighth ounce of cocaine to Raymond Rivera and Kent Palmerton, in violation of 21 United States Code Section 841(a)(1).

Seven. On or about September 1987, Libretti possessed with intent to distribute approximately one pound of cocaine and approximately 600 pounds of marijuana in a storage locker in Wheatridge, Colorado, in violation of 21 US Code Section 841(a)(1).

Eight. On or about early November 1989, in Colorado and elsewhere, Libretti possessed with intent to distribute approximately two kilograms of cocaine which he had received from Biggs, Urso and Sabell, in violation of 21 US Code Section 841(a)(1).

Nine. On or about the latter part of November 1989, in Colorado and elsewhere, Libretti possessed with [13] intent to distribute approximately two kilograms of cocaine which he had received from Biggs Urso and Sabell, in violation of 21 US Code Section 841(a)(1).

Ten. On or about early December 1989, in Colorado and elsewhere, Libretti possessed with intent to distribute approximately two kilograms of cocaine which he had

received from Biggs, Urso and Sabell, in violation of 21 US Code Section 841(a)(1).

11. On or about the latter part of December 1989, in Colorado and elsewhere, Libretti possessed with intent to distribute approximately two kilograms of cocaine which he had received from Biggs, Urso and Sabell, in violation of 21 US Code Section 841(a)(1).

12. On or about June 3, 1989, Libretti, for the purposes of facilitating the illegal drug conspiracy charged in Count 1 of this Superceding Indictment, unlawfully caused the use of a communication facility, in that Libretti caused the person in Chicago, Illinois, to mail to him via United States Postal Service a bank check in the amount of $10,000, which amount represented the proceeds from previous illegal sales of controlled substances, in violation of 21 US Code Section 843(b) and 18 US Code Section 2.

That's the aiding and abetting statute.

13. On or about July 5, 1989, Libretti, for the [14] purpose of facilitating the illegal drug conspiracy charged in Count 1 of this Superceding [sic] Indictment, unlawfully caused the use of a communication facility, in that Libretti caused a person in Chicago, Illinois to mail to him via United States Postal Service a personal check in the amount of $11,000, which amount represented the proceeds from previous illegal sales of controlled substances, in violation of 21 US Code Section 843(b) and 18 US Code Section 2.

14. On or about early January of 1990, in Colorado and elsewhere, Libretti possessed with intent to distribute approximately two kilograms of cocaine which he had received from Biggs, Urso and Sabell, in violation of 21 US Code Section 841(a)(1).

15. On or about the latter part of January 1990, in Colorado and elsewhere, Libretti possessed with intent to distribute approximately two kilograms of cocaine which he had received from Biggs, Urso and Sabell, in violation of 21 US Code Section 841(a)(1).

MS. WOODHOUSE: 26, Your Honor.

THE COURT: This is a great argument for shorter indictments.

16. On or about September 1990, in Colorado and elsewhere, Libretti possessed with intent to distribute approximately two kilograms of cocaine which he had [15] received from Urso, Sabell and Niel Rubano, in violation of 21 US Code Section 841(a)(1).

17. On or about September 24, 1990, in the District of Wyoming and elsewhere, Libretti, for the purpose of facilitating the illegal drug conspiracy charged in Count 1 of this Superceding [sic] Indictment, unlawfully used a communication facility in that Libretti utilized a telephone to communicate details of the illegal drug conspiracy by calling Urso at the King Soopers grocery store pay telephone in Wheatridge, in violation of 21 US Code 843(b).

18. On or about September 24, 1990, at approximately 12:14 p.m., in the District of Wyoming and elsewhere, Libretti, for the purpose of facilitating the illegal

drug conspiracy charged in Count 1 of this Superceding [sic] Indictment, unlawfully used a communication facility in that Libretti utilized a telephone to communicate details of the illegal drug conspiracy by calling Urso at the China Garden restaurant pay telephone in Lakewood, Colorado, in violation of 21 US Code 843(b).

19. On or about September 24, 1990, at approximately 5:05 p.m., in the District of Wyoming and elsewhere, Libretti, for the purpose of facilitating an illegal drug conspiracy charged in Count 1 of this Superceding [sic] Indictment, unlawfully used a communication [16] facility in that Libretti utilized a telephone to communicate details of the illegal drug conspiracy by calling Urso at the China Garden restaurant pay telephone in Lakewood, Colorado.

20. On or about November 29, 1990, in the District of Wyoming and elsewhere, Libretti, for the purpose of facilitating the illegal drug conspiracy charged in Count 1 of this Superceding [sic] Indictment, unlawfully used a communication facility in that Libretti utilized the telephone to communicate details of an illegal drug conspiracy by calling Urso at China Garden restaurant pay telephone in Lakewood, Colorado.

21. On or about November 30, 1990, in the District of Wyoming and elsewhere, Libretti, for the purpose of facilitating the illegal drug conspiracy charged in Count 1 of the Superceding [sic] Indictment, unlawfully used a communication facility in that Libretti utilized a telephone to communicate details of the illegal drug conspiracy by calling Urso at the China Garden restaurant pay telephone in Lakewood, Colorado.

22. On or about March 8, 1990, at 11:00 p.m., in the District of Wyoming and elsewhere, Libretti, for the purpose of facilitating an illegal drug conspiracy charge in Count 1, unlawfully used a communication facility in that Libretti used a telephone to communicate details of [17] the illegal drug conspiracy by calling an unidentified co-conspirator at the King Soopers grocery store pay telephone in Wheatridge, Colorado.

23. On or about March 8, 1990, at 11:00 p.m., in the District of Wyoming and elsewhere, Libretti, for the purpose of facilitating the illegal drug conspiracy charged in Count 1, unlawfully used a communication facility, a telephone, to communicate details of the illegal drug conspiracy by calling an unidentified co-conspirator at the King Soopers grocery store pay telephone in Wheatridge, Colorado.

24. On or about August 21, 1990, in the District of Wyoming and elsewhere, Libretti, for the purpose of facilitating the illegal drug conspiracy identified in Count 1 of the Superceding [sic] Indictment, unlawfully used a communication facility to send a letter to Urso by way of the United States Postal Service, which letter detailed how Urso should deny and disclaim to investigating law enforcement authorities their (Libretti and Urso's) personal association and their illegal agreement with respect to the conspiracy charged in Count 1 of this Indictment.

25. On or about September 4, 1991, in the District of Wyoming and elsewhere, Libretti, for the purpose of facilitating the illegal drug conspiracy charged [18] in Count 1 of this Superceding [sic] Indictment, unlawfully used a communication facility to send a letter to Urso by way of Federal Express overnight package service. Said

letter was sent by Libretti to Urso under the pretense that the letter was from an attorney in Cheyenne, Wyoming and included information on how Urso could testify at the grand jury investigating Libretti and Urso, their personal partnership and their illegal agreement with respect to the illegal drug conspiracy charged in Count 1 of the Superceding [sic] Indictment.

And 26. From on or about January 9, 1991, through and including March 31, 1992, Libretti possessed with intent to distribute approximately two kilograms of cocaine, most of which Libretti ultimately buried near property he owned near Thayne, Wyoming, in violation of 21 US Code Section 841(a)(1).

All of which is alleged to be in violation of 21 US Code Section 848, which is the continuing criminal enterprise statute.

And then under the topic Forfeiture, it alleges that upon conviction of the defendant for engaging in a continuing criminal enterprise, the United States is entitled to forfeiture of all property of any kind constituting or derived from proceeds Libretti obtained directly and indirectly by engaging in said continuing [19] criminal enterprise; all property of any kind which was used or intended for use in any manner or part to commit or to facilitate the commission of this criminal – continuing criminal enterprise, including but not limited to the following, and then there is listed real property, your lot in Star Valley, conveyances of two vehicles, cash proceeds over a hundred thousand dollars and then another $12,000 and a five – 5,100 and 7,600 amount in currency and jewelry and property consisting of a mobile home

and a computer system, bank accounts that are listed in the Indictment, investments that are listed in the Indictment, the additional cashier's checks and the contents of safe deposit boxes, and that's it.

Now, Mr. Libretti, it's a long Indictment. Do you understand it?

THE DEFENDANT: I understand it.

THE COURT: Have you had an opportunity to fully discuss it with your attorneys?

THE DEFENDANT: Yes.

THE COURT: And you have presented to me a plea agreement. Why don't you come forward, Mr. Libretti, and I'll ask you, is this your signature?

THE DEFENDANT: Yes.

THE COURT: And did you read this plea agreement?

THE DEFENDANT: Yes.

[20] THE COURT: And did you fully understand it?

THE DEFENDANT: I do now.

THE COURT: Do you have any questions about it?

THE DEFENDANT: No.

THE COURT: All right. At this time, then, are you ready to plead to Count 6?

THE DEFENDANT: Yes.

THE COURT: To this charge, how do you plead?

(Pause.)

THE DEFENDANT: Guilty.

THE COURT: The clerk will place the defendant under oath.

(Defendant sworn.)

THE COURT: Mr. Libretti, have all of the answers that you've given me up until now been truthful answers?

THE DEFENDANT: What answers?

THE COURT: All of your answers from – that you've given to me this morning.

THE DEFENDANT: Yes.

THE COURT: Are they all truthful?

THE DEFENDANT: Yes.

THE COURT: Are any of them false?

THE DEFENDANT: No.

THE COURT: It is true, then, that you understand this count of the Superceding [sic] Indictment.

[21] THE DEFENDANT: Yes.

THE COURT: And it is also true that you've had a chance to discuss it fully with your attorneys.

THE DEFENDANT: Yes.

THE COURT: And you understand the consequences of your plea.

THE DEFENDANT: Yes.

THE COURT: What are they?

THE DEFENDANT: 20 years.

THE COURT: Minimum.

THE DEFENDANT: Okay.

THE COURT: Yeah. That must be emphasized. You understand that the 20 years is the very minimum that could be imposed on you, and you could get up to life. You understand that?

THE DEFENDANT: I understand that's the law, yes.

THE COURT: Very well. And in addition to that, you could be fined. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand that all of your property could be forfeited, the property that is owned by you by reason of any drug transaction?

THE DEFENDANT: Yes.

THE COURT: All right. Now, I want to ask you this: Is your plea of guilty a voluntary plea?

[22] THE DEFENDANT: Yes

THE COURT: Is anybody forcing you to plead guilty?

THE DEFENDANT: No.

THE COURT: Are circumstances of any type forcing your guilty plea?

THE DEFENDANT: Certainly.

THE COURT: What?

THE DEFENDANT: Yes.

THE COURT: All right. What circumstances?

THE DEFENDANT: Well, just the testimony that we heard last week from some of these people.

THE COURT: What about that testimony?

THE DEFENDANT: Well, my attorney has recommended that I take this course of action because we can't prove that some of these witnesses are lying.

THE COURT: In other words, you're saying that the testimony that you heard in this courtroom last week was so overwhelming that you feel you have no defense to it. Is that correct?

THE DEFENDANT: Correct. Yes.

THE COURT: Is that what I hear?

All right. I rephrased it slightly for you. Now, there is something else. I understand that your mother and father, as well as your brother, are here [23] today and would be the next witnesses called by the United States under subpoena, and they would be obliged to testify. I understand that this is for the purpose principally of proving a negative, mainly that this property that's listed here isn't – wasn't acquired from them by way of gift. Are you pleading guilty to spare them?

THE DEFENDANT: In part, yes.

THE COURT: What's the other part?

THE DEFENDANT: That the testimony we heard last week was overwhelming.

THE COURT: Are you pleading guilty because you are guilty?

THE DEFENDANT: You're asking me if I meet these five requirements, including being an organizer and a manager and those things?

THE COURT: That's in part, yes. The question I'm asking you, are you pleading guilty because you are, in fact, guilty? That's a question that only you can answer. Don't bother looking at your attorney.

THE DEFENDANT: I am guilty of some of the things in here.

THE COURT: Which of the things are you not guilty of?

THE DEFENDANT: That you read off?

[24] THE COURT: Uh-hum.

THE DEFENDANT: Like getting cocaine from Mr. Biggs in November and December and January.

THE COURT: In other words, some of the specific transactions you dispute.

THE DEFENDANT: Yes.

THE COURT: But there are others of the transactions that you don't dispute.

THE DEFENDANT: Correct.

THE COURT: All right. Now, let me ask you this: This count alleges that between January 1, 1984 and the date of the return of the Indictment, and the Indictment was filed on May 22, 1992. Now, the issue is between those two dates, did you knowingly, intentionally and unlawfully engage in a continuing criminal enterprise?

THE DEFENDANT: Well, I guess I don't understand the part about managing, organizing or supervising.

THE COURT: Well, an organizer or supervisor under that section of the Code is –

MR. TRUMAN: Your Honor, may I come to the bench?

THE COURT: Sure.

MR. TRUMAN: I'm handing up the jury instruction that has –

THE COURT: Yeah, that's helpful. Yeah. Mr. Truman has handed me a Devitt & Blackmar instruction which [25] reads: The term "organizer" and the terms "supervisory position" and "position of management" are to be given their usual and ordinary meaning. These words imply the exercise of power or authority by a person who occupies some position of management or supervision. This person need not be the sole or only organizer, supervisor or manager of the activities or persons in question.

That says exactly what I was going to look into the statute and find for you. But that explains it. In other words, you don't have to be the only organizer or supervisor, but you have to have been in a position of management or supervision exercising some power or authority.

Now, were you or were you not?

THE DEFENDANT: A very, very loose reading of that might indicate, yes.

THE COURT: All right. In connection with this conspiracy, were there a continuing series of violations of the drug laws of our country by you and others associated with you?

THE DEFENDANT: You mean three or more?

THE COURT: Yes.

THE DEFENDANT: Yes.

THE COURT: What?

THE DEFENDANT: There were more than three [26] violations.

THE COURT: There were more than three violations?

THE DEFENDANT: Yes.

THE COURT: Was it a continuing series of violations –

THE DEFENDANT: Yes.

THE COURT: – between these dates?

THE DEFENDANT: Yes.

THE COURT: And in that connection, were there at least five other persons with respect to whom you occupied a position of supervision?

THE DEFENDANT: Yes.

THE COURT: Who were they?

THE DEFENDANT: Well, I know the government says that I supervised Schlosser and Dixon because I sold to them, and then they say that I supervised Urso because I bought from him and that I supervised Sabell because he sold to Urso, and I don't know where Biggs fits in that because I don't know if they say I sold to him or I bought from him.

THE COURT: Were there other persons to whom you sold drugs –

THE DEFENDANT: Yes.

THE COURT: – besides them?

[27] THE DEFENDANT: Yes.

THE COURT: On a regular basis?

THE DEFENDANT: Yes.

THE COURT: For instance, I think we heard a couple of women testify last week that they bought or procured drugs from you. Is that correct?

THE DEFENDANT: Yes.

THE COURT: And were there other people as well?

THE DEFENDANT: Well, you heard from Mr. Chinso's testimony. I did sell him some marijuana.

THE COURT: Yeah, I heard his testimony, but what I want to hear now is your testimony.

THE DEFENDANT: Yeah, I sold marijuana to Mr. Chinso.

THE COURT: You did.

THE DEFENDANT: Uh-hum.

THE COURT: Did you have supplies of cocaine and marijuana on hand that you kept in the safe at Lakewood?

THE DEFENDANT: I didn't keep any cocaine or marijuana in that safe.

THE COURT: I see. What did you keep in the safe?

THE DEFENDANT: Guns and some money.

THE COURT: Guns and money.

THE DEFENDANT: Uh-hum.

[28] THE COURT: Where did you keep the cocaine and marijuana?

THE DEFENDANT: Well, I haven't had any marijuana since like 1988 that I was selling, but back then when I had it, I had it in a storage locker.

THE COURT: I see. There was some testimony about a storage locker in Lakewood.

THE DEFENDANT: It was in Wheatridge.

THE COURT: I see.

THE DEFENDANT: There was marijuana and cocaine in there. There wasn't a quarter million dollars in cash, but there was some money in there.

THE COURT: There was some money, but not that much.

THE DEFENDANT: No.

THE COURT: I see. Well, let's – have you got a copy of the Indictment in front of you.

THE DEFENDANT: Yes. Yes.

THE COURT: Starting here on page 22, paragraph 1 of Count 7 – 6, rather, it says that you conspired with these people, including Biggs, Urso, Dixon, Schlosser and Sabell to commit violations of the Controlled Substances Act as alleged in Count 1. Did you do that?

THE DEFENDANT: Yes.

THE COURT: And this was a conspiracy to buy and [29] to sell cocaine and marijuana; is that right?

THE DEFENDANT: Yes.

THE COURT: All right. Paragraph 2 says that between 1984 and 1985, you distributed on a monthly basis three ounces of cocaine per month to Craig David Juliano. Did you do that?

THE DEFENDANT: Not three ounces a month. Probably one or two.

THE COURT: How much?

THE DEFENDANT: One or two for about a year.

THE COURT: Two ounces.

THE DEFENDANT: One or two.

THE COURT: One or two.

THE DEFENDANT: Yes.

THE COURT: I see. Did the amount vary each month?

THE DEFENDANT: No. It was probably one ounce a month for six months and then two ounces a month for six months.

THE COURT: I see. It was an increasing thing.

THE DEFENDANT: Yes.

THE COURT: All right. Paragraph 3 charges that between 1986 and 1990, Dixon unlawfully distributed ten kilograms of cocaine to Michael Carson. Did that happen?

THE DEFENDANT: I don't know if it did or not. I [30] know how much I sold to Dixon, and it's probably closer to ten ounces than ten kilograms.

THE COURT: But you did sell cocaine to Dixon knowing that he in turn was reselling it –

THE DEFENDANT: Yes.

THE COURT: – to Carson.

THE DEFENDANT: No. I've never seen Mike Carson before in my life. I never heard his name until all this started.

THE COURT: You knew that Dixon was selling.

THE DEFENDANT: Yes.

THE COURT: All right. Paragraph 4 charges that between January 1987 and August 1987, you distributed cocaine in one-eighth ounce quantities to Raymond Rivera on at least 15 separate occasions. Is that true?

THE DEFENDANT: I think six separate occasions would be a more accurate.

THE COURT: You did it at least six times.

THE DEFENDANT: At the most, six times.

THE COURT: All right. Paragraph 5 charges that in July 1987, you possessed a pound of cocaine.

THE DEFENDANT: I know I didn't possess a pound of cocaine. I did possess some cocaine then.

THE COURT: How much.

THE DEFENDANT: Well, Mr. Rivera and Palmerton [31] testified it was about three ounces. I think it was closer to six or eight. I told Palmerton it was eight to 16, because I know that when I got it, it was 16, but I had had it for several months at that point. I probably sold half of it.

THE COURT: Paragraph 6 says that in July '87, you distributed an eighth ounce of cocaine to Rivera and Palmerton. True or not?

THE DEFENDANT: True.

THE COURT: 7 says that in September 12, 1987, you possessed one pound of cocaine with intent to distribute it and 600 pounds of marijuana in a storage locker at Wheatridge.

THE DEFENDANT: I've never even seen 600 pounds of marijuana. I didn't possess it.

THE COURT: How much marijuana did you have?

THE DEFENDANT: Between 12 and 14 pounds.

THE COURT: And how much cocaine did you have?

THE DEFENDANT: The five to eight ounces from July that was from number 5.

THE COURT: Paragraph 8 charges in November 1989, you possessed with intent to distribute two kilograms of cocaine which you had received from Biggs, Urso and Sabell.

THE DEFENDANT: See, I know Mr. Biggs was in [32] Florida then because I bought him a plane ticket at his request because I got these student deals. So I know I didn't get two kilograms of cocaine from Mr. Biggs in November of '89.

THE COURT: How much did you get?

THE DEFENDANT: I didn't get any from Mr. Biggs.

THE COURT: How much did you get from Urso and Sabell?

THE DEFENDANT: I honestly can't say I got any then because I know where I was in November of '89, and I don't think I got any from them the whole month.

THE COURT: So that's – paragraph 8 is one of the ones you've had trouble with.

THE DEFENDANT: And 9, the same month.

THE COURT: Nine is the same amount, and that's November '89. You have a problem with that.

THE DEFENDANT: Yeah.

THE COURT: All right. How about 10?

THE DEFENDANT: Ten and 11, again, I know when I got it from them.

THE COURT: That charges you each one with two kilograms.

THE DEFENDANT: See, that didn't happen. I know that the purchase was the day before Dixon was busted, or maybe two days before, and that was in February.

[33] THE COURT: I see. So what your principal problem here is that you are disputing the quantities.

THE DEFENDANT: And some of the things that happened. I am willing to accept responsibility for what I did, but I think the record should be clear.

THE COURT: All right. Well, we must go through the rest of it, then. Let's talk about 11. That charges you with two kilograms. You say it's untrue.

THE DEFENDANT: Right.

MR. TRUMAN: Excuse me, Your Honor. I think what Mr. Libretti mentioned in terms of 11 is that it was true that he did receive those drugs, but that it wasn't in December of '89. Rather, it was in February of '90.

THE DEFENDANT: Right, but it wasn't from Biggs.

THE COURT: Oh, is that it?

THE DEFENDANT: Yes, but it wasn't from Biggs.

THE COURT: Was it from Urso or Sabell?

THE DEFENDANT: Yes.

THE COURT: This says Urso, Biggs and Sabell.

THE DEFENDANT: It used the conjunctive and I wanted to make it clear.

THE COURT: Let's take paragraph 12. That charges you with having caused a person in Chicago to mail you a check for $10,000.

THE DEFENDANT: Well, I don't dispute the check, [34] but I was in Chicago on June 3rd, so I hardly think I would have asked my brother to mail it to me since that was the day my other brother got married. I know I was there.

THE COURT: Did you get your brother to get the check?

THE DEFENDANT: Sure. I'm sure I did.

THE COURT: Yeah. So you just dispute the use of the communication facility.

THE DEFENDANT: Yeah. I don't know why I would have told him to mail it to me when I was there. That doesn't make sense.

THE COURT: And paragraph 13 says that you caused a person in Chicago to mail you a check for 11,000. That's your other brother.

THE DEFENDANT: Yes.

THE COURT: William.

THE DEFENDANT: Yes.

THE COURT: And did he do that?

THE DEFENDANT: Yes.

THE COURT: And did you cause him to do that?

THE DEFENDANT: Yes.

THE COURT: That one is true.

THE DEFENDANT: Yes.

THE COURT: Okay. Next 14, it alleges that in January 1990, you possessed two kilograms. Is that true or [35] false?

THE DEFENDANT: No, it was in February that I –

THE COURT: It was in February.

THE DEFENDANT: Yeah.

THE COURT: All right. And now, this alleges that – in 15, that's another two kilograms.

THE DEFENDANT: There was one transaction in February shortly before Dixon was arrested.

THE COURT: All right. And how much was in that transaction?

THE DEFENDANT: Two.

THE COURT: Two kilograms.

THE DEFENDANT: Yes.

THE COURT: Okay. Then in 16, it alleges that in September 1990, you possessed two kilograms.

THE DEFENDANT: I know Mr. Urso said that, but I never got them.

THE COURT: Well, it may be that we'll have to have a hearing on the quantities of cocaine that are involved in this because as you know, the quantity makes a difference in the amount of the sentence. But going ahead, 17 charges that you used a telephone by calling Urso at King Soopers' pay telephone in Wheatridge on September 24, 1990. Did you do that?

THE DEFENDANT: Yes.

[36] THE COURT: And was it to facilitate a drug conspiracy?

THE DEFENDANT: I think that's why he wanted me to call him, yes.

THE COURT: All right. And 18 charges that you called Urso on September 24, 1990 at the China Garden restaurant pay telephone. Is that true?

THE DEFENDANT: Yes.

THE COURT: And 19 charges that on September 24, 1990 at 5:05 p.m., you called Urso at the China Garden restaurant. Did you do so?

THE DEFENDANT: Yes.

THE COURT: And 20 alleges that on November 29, 1990, you called Urso at the same place.

THE DEFENDANT: Yes, I called him.

THE COURT: Very well. November 13, 1990 charges that you utilized a telephone by calling Urso at the China Garden restaurant in Lakewood. Is that so?

THE DEFENDANT: Yes.

THE COURT: And 22 charges on March 8, 1990 at 9:11 p.m., you called an unidentified co-conspirator at the King Soopers grocery pay telephone in Wheatridge. Did you do so?

THE DEFENDANT: No, and I think that is supposed to be March 8, '91 from what I've read in the grand jury [37] stuff. I could be wrong, but that's what they said in the grand jury.

THE COURT: So you deny 20.

THE DEFENDANT: I'm denying the date. I think that's a typo.

THE COURT: I see. You think it may be '91. You're not denying that you may have called somebody at the King Soopers pay telephone.

THE DEFENDANT: I may have called someone. I can't imagine who I would have called, and it wouldn't have been about drugs then.

THE COURT: Is that kind of the way you operated in connection with this drug conspiracy?

THE DEFENDANT: I made a few calls to those pay phones, yes.

THE COURT: Now, 23 charges that on March 8, 1990, you called co-conspirator at King Soopers' pay telephone in Wheatridge. Is that the same problem?

THE DEFENDANT: Again, either the date is wrong or I don't know who I would have called then.

THE COURT: All right. 24 charges that you used the Postal Service to send a letter to Urso telling him to deny this claim to the law enforcement authorities your association together. Did you do that?

THE DEFENDANT: Yes.

[38] THE COURT: And 24 is true.

THE DEFENDANT: Yes.

THE COURT: Is 25 true, which says that you Fed Ex'd a letter to Urso about instructions pretending it was from an attorney in Cheyenne?

THE DEFENDANT: I did send him a letter, and I put an attorney's name on it, but I wasn't telling him how to testify. All I did was told him what a penalty was for contempt because he asked me to send him that letter.

THE COURT: Finally, 26 says that on January 9, 1991, you possessed with intent to distribute two kilograms. Did you do so?

THE DEFENDANT: Yes.

THE COURT: And did you bury it on property that you owned near Thayne, Wyoming?

THE DEFENDANT: Yes.

THE COURT: And it was that much.

THE DEFENDANT: How much?

THE COURT: Two kilograms.

THE DEFENDANT: No.

THE COURT: How much was it?

THE DEFENDANT: I've been told it was 1.6.

THE COURT: I see. So you think it is closer to 1.6 than 2.

THE DEFENDANT: Yes.

[39] THE COURT: All right. Tell me, Mr. Libretti, how much cocaine do think was involved as a total in this conspiracy?

THE DEFENDANT: Well, I've been thinking about this, and I probably did buy three or four from Scott Raymond, kilograms over time, you know.

THE COURT: You think a total of three or four kilograms over this ten-year period.

THE DEFENDANT: No, no, no, from one person, from Scott Raymond. This was back in '84.

THE COURT: I see. All right.

THE DEFENDANT: And –

THE COURT: How much did you buy from Urso?

THE DEFENDANT: That's what I'm figuring. And I believe we had five at the most, six transactions. The first one was for one. So the other four or five would have been for two. That would include anything having to do with Sabell also.

THE COURT: Well, I was just going to ask you –

THE DEFENDANT: That is Urso and Sabell combined.

THE COURT: Urso and Sabell were together?

THE DEFENDANT: First one was one and the last –

THE COURT: What about Biggs?

THE DEFENDANT: You know, I probably did buy some from him, but it wasn't on any kind of regular basis or [40] anything. I didn't like his stuff, so if I give you the benefit of the doubt, I'll say the whole time I knew him, I bought one and a half to two.

THE COURT: All right. Let me ask you this, Mr. Libretti, you heard all of the testimony that I heard here last week. Was that testimony true?

THE DEFENDANT: It was not all true, but some of it was.

THE COURT: Which was not true?

THE DEFENDANT: Oh, Mr. Carson saying he was buying quarter pounds of cocaine and quarter pounds of marijuana and things like that. That wasn't true. What was that one guy's – Mr. Carson saying I repossessed his (illegible) and I threatened him and his family. That never happened. He said I took Dixon's car title. That never happened.

THE COURT: Was it substantially true except for these details that you point out?

THE DEFENDANT: Well, the only part that is true is I did sell some drugs to Mr. Dixon.

THE COURT: Over this period of time that we're talking about, January 1, 1984 to 1992, approximately an eight-year period there, you were involved in a drug conspiracy, were you not?

THE DEFENDANT: Yes.

[41] THE COURT: And you sold cocaine and marijuana; is that true?

THE DEFENDANT: Yes.

THE COURT: And there is – you were more or less a leader or supervisor, were you not?

THE DEFENDANT: I don't think so, but I can see how you could say that.

THE COURT: Well, you did occupy some position of management, did you not?

THE DEFENDANT: I had people that I supplied.

THE COURT: You got the cocaine and you supplied it to people and you got money in return for it.

THE DEFENDANT: That's correct.

THE COURT: And did that to some extent with the marijuana.

THE DEFENDANT: Yes.

THE COURT: All right. Now, it goes back to the question that I asked you before that you hesitated to answer. Are you pleading guilty because you are?

THE DEFENDANT: Yes.

THE COURT: I think that's obvious, isn't it?

THE DEFENDANT: I just, you know, I question the organizer, manager, supervisor. I never told anyone what to do.

THE COURT: All right. Now, let me ask you this: [42] You've read this plea agreement. Are there any terms in this plea agreement that weren't typed and put in it that you are relying on here today? Is this the entire agreement is my question?

THE DEFENDANT: Yes.

THE COURT: It is the entire agreement.

THE DEFENDANT: Yes.

THE COURT: All right. And there is one other question that I haven't asked you yet and I should have, are you impaired in any way at this time?

THE DEFENDANT: No.

THE COURT: Have you in the last 24 hours been under the influence of any medication, drugs, narcotics, intoxicants or anything that would affect your mind and memory?

THE DEFENDANT: No.

THE COURT: Your mind is now clear at this time; is that correct?

THE DEFENDANT: Yes.

THE COURT: And are you fully satisfied with the services of Mr. Truman and Mrs. Miller?

THE DEFENDANT: Yes.

THE COURT: I'm glad to hear you say that because I think here particularly very able. And after all this discussion, is your guilty plea a voluntary plea?

[43] THE DEFENDANT: Yes.

THE COURT: All right. The Court finds that the plea of guilty is a voluntary plea and the Court further finds that there is a factual basis for the guilty plea, and it may now be entered and the plea agreement may be approved.

And it will now be necessary, Mr. Libretti, for you to be interviewed by the probation officers; either Mr. Bonham or one of his assistants, and then at the appropriate time, you'll be brought back for the purposes of sentencing. Until then you're remanded to the custody of the marshal.

Sit down, through for the time being and we'll bring the jury in.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

(Caption Omitted In Printing)

PROSECUTOR'S STATEMENT

(Filed Nov. 13, 1992)

COMES NOW, the United States of America, by and through Gay Woodhouse, Assistant United States Attorney for the District of Wyoming, and for its prosecutor's statement briefly summarizes evidence as it relates to Joseph V. Libretti Jr. as follows:

1. In 1981, Joseph V. Libretti Jr. (Libretti) moved from Mt. Prospect, Illinois, to Denver, Colorado, to attend Denver University with a major in hotel/restaurant management. In 1982 Libretti began his drug distribution network in the Denver, Colorado, metropolitan area first distributing primarily marijuana and shortly afterwards, cocaine.

2. This drug distribution network continued until January, 1992, in the District of Wyoming, in Colorado, in Florida, and elsewhere.

3. In about 1984 and 1985, Libretti obtained his cocaine from Scott Raymond of Denver, Colorado, who was arrested in about 1985. Raymond testified at the trial that he sold at least 5 kilograms of cocaine to Libretti.

4. During 1985 and continuing through 1986, John Biggs acted as Libretti's supplier for cocaine. Biggs obtained at least ten kilograms of cocaine for Libretti during this time period.

5. During 1984 and 1985, Libretti sold cocaine for redistribution to Craig Juliano in one- to two-ounce quantities on a weekly basis. Juliano was arrested in 1985 for selling cocaine.

6. In about September, 1985, Libretti purchased a home located at 2440 Willow Lane, in Lakewood, Colorado. The home cost approximately, $192,000 and Libretti and his girlfriend at that time, Toni Cambruzzi, paid $104,000 in cash for the home. All but approximately $32,000 of that money came from Libretti and constituted the profits from his drug sales.

7. In about 1986 Daniel Dixon began purchasing one- to two-ounce quantities of cocaine from Libretti on a weekly or twice monthly basis for distribution primarily to Michael Carson. Dixon and Carson were apprehended together in February of 1990 with 4 ounces of cocaine which Dixon had just purchased from Libretti.

8. In June of 1986, Libretti made a deposit in the amount of more than $20,000 cash to his bank account and then purchased a GNMA Mortgage as an investment. This money also represented proceeds from Libretti's drug distribution business.

9. At the end of 1986, Libretti applied for and received a license to be a firearms dealer, a Federal Firearms Licensee (FFL), which enabled him to purchase and possess semi-automatic firearms. Libretti later obtained a tax stamp which allowed him to deal in Title II firearms or fully automatic firearms, silencers, and weapons of that type. Libretti spent at least $243,000 for firearms which were in his arsenal at the time they were seized by law enforcement authorities in 1991. The money spent for

firearms also constituted proceeds from Libretti's drug distribution network.

10. From about 1984 until July of 1987, Libretti sold cocaine in one to two and a half ounce quantities to Dave Corson a/k/a "Frosty" for redistribution to others. One of Corson's customers was Raymond Rivera who later became a direct customer of Libretti.

11. Raymond Rivera (Rivera) observed Libretti entering a Public Storage locker in early September, 1987. Rivera later returned to the storage locker and broke into it. At the time Rivera entered the locker, he saw approximately $150,000 in cash in a briefcase (Rivera took approximately $10,000), approximately 1 pound of cocaine which Rivera stole, and approximately six large garbage bags containing as much as several hundred pounds of marijuana. Libretti was interviewed about the storage locker theft after a search warrant was executed at his residence at 2440 Willow Lane on January 9, 1991, and admitted that it was his money, cocaine, and marijuana that were stolen from the storage locker. Libretti also admitted that he was a drug dealer and that he "thought about killing" Rivera when Libretti learned that Rivera had stolen the money and drugs from the storage locker.

12. In August of 1987, Libretti opened a safe deposit box with his brother, William, in which he left $48,000 in cash. In early 1989, Libretti began to instruct William on what to do with the cash, some of which was returned to Libretti and some of which was to be invested by William. At one time, Libretti also placed approximately $10,000 in an account with his brother, Timothy's name

and social security number on it in order to avoid having the interest show up under Libretti's name.

13. Libretti continued to be actively involved in cocaine and marijuana distribution, using Richard Dave Schlosser (Schlosser) to distribute cocaine for him in the Loveland, Colorado, area. Claude Jay Cismaru was also actively involved in distributing marijuana and small quantities of cocaine for Libretti. John J. Biggs was also involved in providing Libretti with cocaine from Florida and for distributing some of Libretti's cocaine.

14. In June, 1989, Libretti moved to Green River, Wyoming, and began working at General Chemical in a temporary position in the accounting department. In late August, 1989, Libretti was hired full-time by General Chemical. Libretti travelled from Green River to Lakewood on an almost weekly basis in order to continue to manage and supervise his drug distribution network. During the summer of 1989, Libretti acquired a new source of cocaine, George Richard Sabell a/k/a Chinzo (Sabell), who's [sic] function was to provide 1 to 2 kilogram quantities of cocaine to Libretti through Brian S. Urso, an associate in the drug business of Libretti since about 1987. Libretti directed, via the telephone, the actions of Urso in connection with the purchases of cocaine from Sabell. Libretti instructed Urso to use the pay telephones at the China Garden Restaurant and the King Soopers in the area near 2440 Willow Lane. Libretti would contact Urso at the 2440 Willow Lane address and direct Urso go to one of the two pay telephones, designated by a code set up by Libretti of "Mr. King's" for the pay telephone located at the nearby King Soopers, and "Mr. Wong's" for the pay telephone located at the China

Garden Restaurant. Urso would not engage in a cocaine transaction with Sabell until the price and the delivery of the cocaine had been approved by Libretti.

15. In about July of 1989, Urso, who had been an associate of Libretti's, began to purchase cocaine for Libretti from George Richard Sabell a/k/a Chinso (Sabell). On the first occasion, Libretti, through Urso, purchased one kilogram of cocaine from Sabell for a price of approximately $28,000. After the first buy, Sabell would provide two kilogram quantities to Libretti, sometimes dealing directly with Urso and Libretti, and other times, dealing with Urso. Sabell provided two kilogram quantities of cocaine approximately every six weeks between July, 1989, and December, 1990 for a total of approximately 24 kilograms. At the time, Urso was living in Libretti's house at 2440 Willow Lane, Lakewood, Colorado, from about February, 1989, through the end of 1990.

16. Dixon was arrested on drug charges in February, 1990, with Michael Carson, but Dixon was released and not charged. Dixon was released after a preliminary hearing in which the judge found that there was not sufficient evidence of Dixon's involvement in the transaction to bind Dixon over. This lack of evidence was primarily due to the fact that Carson would not implicate Dixon in the drug transaction. In fact, Carson believed that if he did implicate Dixon or Dixon's supplier, Carson would be killed. Dixon had gone into great lengths to tell Carson about his (Dixon's) supplier, "Joe's" arsenal of fully automatic weapons and his expertise at using them.

17. Because Dixon was released, Libretti and Biggs had discussions about killing Dixon because they

believed Dixon had become a government informant and was working against them. By that time, Dixon had actually lived in Libretti's home for a couple of months and had witnessed a Sabell delivery of cocaine in which Libretti, Sabell and Urso were all present; Dixon had also seen substantial sums of cash lying around the house and was aware of who some of Libretti's other distributors were. Libretti agreed to pay $50,000 to Biggs if Biggs would kill Dixon. At one point in the spring of 1990, Dixon saw Biggs at a bar and took a ride with Biggs. Dixon jumped out of the car when Biggs went into a desolate area outside the Denver city limits because Dixon believed that Biggs intended to harm him.

18. Libretti's gun business was used to launder drug proceeds and was primarily a "front" for Libretti. The gun business was a way for Libretti to justify his income since Libretti was not working at times during the conspiracy and, when he was working, was not bringing in the money that would pay for the Lakewood house and other investments.

19. The first of Libretti's recorded gun transactions was an illegal transfer of a firearm to Biggs, using the alias of William Demetro.

20. In approximately February of 1988, Libretti illegally transferred a Taurus, Model 80, .38 caliber revolver to Urso, who had previously been convicted on two occasions for felony drug charges. Libretti transferred the gun to Urso in the name of Terri Lynn Urso who was Urso's wife at the time.

21. Many of Libretti's gun transactions were to people who were involved with him in the drug trade (Biggs,

Schlosser, Sabell, Dixon, Urso and others). Libretti also knew that these people and others were drug users as well and yet in each instance, Libretti allowed them to lie on what is known as an ATF (Alcohol, Tobacco and Firearms) Form 4473 when they were asked to check if they were illegal users of or addicted to narcotic drugs.

22. While Libretti was in Green River, he used two deputies in the Sweetwater County Sheriff's office to lie on letters stating that the Sweetwater County Sheriff's office was interested in purchasing fully automatic weapons, when the Sheriff's Department had no budget for and no to intent to purchase any weapons. Due to the complicity of these two sheriff's deputies, Libretti was able to obtain approximately 37 fully automatic firearms. The sheriff's deputies also signed a number of letters which enable Libretti to obtain many other semi-automatic firearms which appeared to have been transferred to sheriff's deputies, but were merely kept in Libretti's arsenal as were most of the fully automatic firearms. Libretti gave one of the deputies a gun in exchange for his assistance with these letters.

23. During the time that Libretti owned the residence located at 2440 Willow Lane in Lakewood, Colorado, Libretti, Biggs, Urso, and Scott P. Matheu, among others, fired silenced and unsilenced fully automatic weapons off the back porch area of Libretti's home in Lakewood, Colorado. This would often occur during, or shortly after, drug transactions and/or drug usage had occurred at Libretti's Lakewood, Colorado residence.

24. Libretti acquired two large safes in his Lakewood, Colorado, home between 1987 and 1989. Libretti

used these safes to store large sums of cash, fully automatic and semi-automatic firearms, many of which were loaded, and kilogram quantities of cocaine. Libretti, Urso, Biggs, Sabell, Schlosser, and Dixon all witnessed the contents of the safes and conducted some of the drug transactions around these safes when they were open.

25. Libretti stored large sums of cash and cocaine in safe deposit boxes in various banking institutions around the Denver, Colorado, metropolitan area and in Mount Prospect, Illinois. Frequently, Libretti would travel with other members of the conspiracy, Dixon, Schlosser, and Biggs, to these banks to obtain drugs from these safe deposit boxes. Sometimes during trips to the safe deposit boxes, wherein Libretti would pick up cocaine and cash, Libretti would have loaded guns on or about his person and vehicles. In addition, Libretti stored controlled substances, an illegal machine gun and a cashier's check for $65,000 which represented drug proceeds in his personal use locker at General Chemical in Green River.

26. In Libretti's home at 2240 Willow Lane, Lakewood, Colorado, a number of loaded firearms were located throughout the house. All co-conspirators were aware of the existence of these firearms.

27. Libretti used his firearms business to launder money received by him as a result of the distribution and sales of cocaine and marijuana.

28. Libretti also laundered drug proceeds by purchasing several automobiles, real property in the state of Wyoming, and other investments.

29. Libretti directed the manner in which deals would be done with Dixon. Libretti, of course, always set the price and the time the deal would occur. Libretti directed Dixon with regard to Dixon's customers continued purchases and payments for cocaine. At one point, Carson, one of Dixon's customers fell behind in his payments for cocaine which had been fronted to Carson by Dixon. Dixon and Libretti discussed what to do about Carson's debt; Libretti told Dixon to continue to supply Carson with "the product" because Carson could not get out of debt without cocaine to sell to others. Later, when Carson's debt became larger, Libretti told Dixon to take something of Carson's which had some value. Dixon used Libretti's truck to seize and sell Carson's drums and keyboard as collateral for the cocaine debt. Libretti also required that the payment for cocaine be "faced" (stacked with all faces up) and in larger denominations (at least "tens").

30. Libretti also directed the drug distribution efforts of Schlosser. Libretti told Schlosser not to sell drugs from his (Schlosser's) home and not to store drugs at Schlosser's house. Libretti told Schlosser to get a storage locker and a safe deposit box in which to store cocaine and cash, to relocate them periodically, and not to enter them too frequently. Libretti required that Schlosser use pay phones in order to have certain conversations with Schlosser concerning drug deals. Libretti frequently contacted Schlosser to see how his sales were going and whether or not Schlosser was ready to "re-up" (purchase additional quantities of cocaine.) Libretti invented a fictitious machine shop business for Libretti and Schlosser to

be partners in, in order to help Schlosser explain Schlosser's frequent trips to Lakewood and extra income to Schlosser's wife.

31. Libretti directed Biggs' trips from Florida to Colorado to provide Libretti with cocaine. Libretti would instruct when the trips should be made and always dictated the amount of the deliveries (no more than two-kilogram quantities per trip.)

32. Libretti directed the actions of Urso in acquiring cocaine from Sabell for Libretti. Libretti approved the price, quantity, and time of delivery. Once the transaction occurred and Urso obtained the cocaine, Urso placed the cocaine in one of the safes at the Lakewood house and it remained there, untouched, until Libretti arrived from Wyoming to weigh, divide, and distribute the cocaine to Schlosser, Dixon, and others. Libretti provided Urso with the combination to the safe only when Urso needed to gain access to the safe in order to pay Sabell for a cocaine delivery. Sometime in December of 1990, Libretti told Sabell that there would be no more purchases of cocaine until such time as Libretti decided to continue. When Urso became addicted to cocaine and a perceived liability to Libretti, Libretti evicted Urso from his Lakewood home.

33. In nearly all instances, Libretti required money up front for drugs, he required that the money be "faced" and in certain denominations. Libretti directed the manner in which he would be contacted by his dealers, the words which could be used over the phone, the times when the use of pay phones was necessary, and frequently even which pay phones would be used. Libretti's

address book contained the telephone numbers for King Soopers pay phone, the China Garden pay phone and a gas station pay phone used by Schlosser in Loveland. Interestingly enough, Libretti's address book also contained the entire description of Biggs' false, William Demetro identity, including driver's license number and address. Throughout the drug conspiracy and in relation to the co-defendants, Libretti acted as an organizer, supervisor, manager and controller of the drug distribution network. Libretti took an active interest in his drug distributors' business as outlined above.

34. On about August 21, 1991, Libretti sent a letter to Urso who was at that time incarcerated at the Limon Correction Facility in Limon, Colorado. The letter specifically told Urso that when contacted by federal investigators, Urso should say that the only relationship between Urso and Libretti was that of landlord and tenant and although they did talk on a number of occasions over the telephone, the substance of the conversations was always landlord-tenant matters. In other words, telling Urso what lie to use to explain the frequent telephone contacts between Urso and Libretti when questioned by federal agents. Libretti sent a subsequent letter to Urso (verified by handwriting exemplar identification) which was sent via federal express with the return address of Cohen, Cohen and Cohen, 1221 East 12th Street, Cheyenne, Wyoming 81234 phone number 307-634-0112. Inside the federal express mailer was a typed letter to Urso from Joe telling Urso what to do when questioned before the federal grand jury in Wyoming (invoke the fifth amendment).

35. Libretti also hired attorneys or attempted to find attorneys and offered to help pay for attorneys for most of his co-conspirators when they were questioned by the grand jury or federal agents and some when they were arrested on drug charges.

36. On about November 21, 1991, Libretti was subpoenaed by the federal grand jury to produce handwriting samples for comparison with other documents seized during the execution of a number of search warrants on Libretti's residences and storage lockers. Libretti's handwriting on that occasion was found by the handwriting expert at the Wyoming State Crime Lab to be deceptive. Libretti took as long as 45 seconds to sign his name which is one of the indications of deception. His handwriting on this occasion was significantly different from the handwriting seen on numerous checks, contracts which were notarized, legal documents, personal diaries, notes from classes and courses and other documents which were witnessed to be Libretti's handwriting. Libretti's original signature on his motel receipt at La Quinta on the night prior to giving the handwriting samples was again the same (and significantly different from that given by him when he provided the handwriting exemplars) as the handwriting in the possession and handwriting obtained on December 4, 1991, during the execution of a search warrant on Libretti's office at General Chemical.

37. While Libretti was under investigation, he buried one and a half kilograms of cocaine adjacent to his property in the Star Valley area near Thayne, Wyoming. After this cocaine was seized, Libretti wrote a letter (handwriting verified that it was Libretti) to Joe Kalady (an inmate/jailhouse lawyer/friend of Libretti's) stating

that if the government did not find fingerprints on the containers, Libretti would "simply claim" that the dope was buried by Schlosser (who advised the government that Libretti had purchases ammunition cans to effect such a burial.)

38. There are additional sums of money Libretti received from his drug business which have not been mentioned. Libretti had approximately $12,000 in cash hidden in a paint can in the basement of his girlfriend, Claudia Porter's house when he was arrested. Libretti also had a $28,000 cashier's check in August of 1991 and more than $28,000 in cash in his safe deposit box in Mt. Prospect, Illinois. There is evidence that Libretti travelled to Ann Arbor, Michigan and to Portland, Oregon with substantial amounts (perhaps as much as $100,000 on each occasion) of cash, none which has been located by law enforcement authorities to date. After Libretti was arrested, he directed Claudia Porter to transfer approximately $9,500 to Joseph Kalady in order to keep it from federal authorities. Libretti also transferred his property in Star Valley to his father and attempted to transfer some of his investments to his father in order to keep federal authorities from forfeiting or seizing these assets.

DATED this 13th day of November, 1992.

RICHARD A. STACY
United States Attorney

By: /s/ Gay Woodhouse
GAY WOODHOUSE
Assistant United States Attorney
DAVID A KUBICHEK
Assistant United States Attorney

(Certificate Of Service Omitted In Printing)

[TRANSCRIPT OF PROCEEDINGS, SENTENCING]

[3] PROCEEDINGS

(Hearing proceedings commenced

11:15 a.m., December 23, 1992.)

THE COURT: Case of the *United States versus Joseph V. Libretti. Jr.*

Miss Woodhouse?

MS. WOODHOUSE: Good morning, Your Honor, Mr. Truman. We are here this morning in the sentencing of *United States of America versus Joseph V. Libretti, Jr.*, criminal Docket number CR-92-0006 B. Plaintiff Libretti is here with his counsel Craig Truman and Linda Miller for the sentencing.

As the Court remembers, we started trial on this matter September 28th, and Mr. Libretti chose to plead guilty pursuant to a plea agreement on October 5th, and he pled guilty to a violation of being engaged in a continuing criminal enterprise which is prohibited by 21 USC 848.

THE COURT: Thank you, Ms. Woodhouse. The first matter I will take up are the objections on behalf of the defendant to the presentence report.

Mr. Truman, would you care to proceed on that issue?

MR. TRUMAN: Your Honor, we acknowledge the presentence investigation done by Mr. Schoen from [4] Mr. Bonham's office. Your Honor, we agree that the calculation of the sentencing guidelines is correct; that there is a two-level enhancement for obstruction of justice

and a two-level mitigation for acceptance of responsibility. Your Honor, that puts us at a level 38.

Also, Your Honor, we have provided the Court with ample defendant's version. Your Honor, many of those things in the defendant's version are opposed to those versions of events provided by the government.

Your Honor, those are factual difficulties that –

THE COURT: Basically, the things that were said in the defendant's version that is incorporated now in the presentence report are about the same things that he told me at the time of the entry of the plea, if my recollection is correct.

MR. TRUMAN: It is very consistent, Your Honor.

THE COURT: And so it's nothing – no surprise to the Court.

MR. TRUMAN: Your Honor, with that exception, concerning the factual predicate around these – these events –

THE COURT: If – If there is some problem with the defendant's version in the presentence report that would follow him to the place where he's incarcerated, I [5] would, under those circumstances, be willing to order that to be stricken so that he didn't have that albatross hanging around his neck.

MR. TRUMAN: That would be our request.

THE COURT: All right, so ordered. Any other objections?

MR. TRUMAN: Otherwise, Your Honor, there's two typographical errors.

THE COURT: Oh, well, we can ignore the typographical errors –

MR. TRUMAN: They are somewhat significant.

THE COURT: Mr. Libretti, nothing serious about that. Any further objections to the presentence report?

MR. TRUMAN: Your Honor, otherwise, the report of Mr. Libretti's background, education, financial circumstances are accurate.

THE COURT: Fine. Thank you very much, Mr. Truman.

Did you have anything with respect to the presentence report, Miss Woodhouse?

MS. WOODHOUSE: No, Your Honor, the United States does persist in believing that Mr. Libretti should not be receiving two levels off for acceptance of responsibility because of the nature of his statement being so minimizing of his criminal activity.

[6] THE COURT: Well, I think he accepted responsibility but maybe it came a little late in the case. But nonetheless, it was an acceptance.

At the time of the entry of the plea I think he clearly admitted his guilt and under those circumstances, I think he's entitled to the two levels off. However, with regard to the two-level increase for obstruction of justice, there is no doubt in the Court's mind that Mr. Libretti attempted

to alter his handwriting on the exemplars that went to the grand jury and did in fact obstruct justice there. I think I have to regard that as – I think the probation officer was right in treating it that way.

The other thing about it is it doesn't really make a lot of difference in a case like this because there is a 20-year mandatory minimum sentence and this two-level increase for obstruction of justice brings the lower level up to 24 – 240 months. So it doesn't seem to me like it makes much difference. So, so ordered.

MR. TRUMAN: Thank you.

THE COURT: Now, Mr. Libretti, you do appear before me for the purposes of sentencing, and I will first assume, is it not correct, that you've read the presentence report.

MR. LIBRETTI: That's correct.

[7] THE COURT: Are there any further changes that you believe ought to be made?

MR. TRUMAN: May I have a moment, Your Honor?

THE COURT: Surely.

MR. LIBRETTI: Okay. On page 16, second line, where it says I sold him about six or seven ounce quantities. It should be one-eighth. It should be a fraction between ounce and quantities.

THE COURT: Six or seven eightballs.

MR. LIBRETTI: Yeah.

THE COURT: Okay. I will consider that as being the intent of that statement. It's part of your statement of what you did, which I've just ordered stricken anyway, so it wouldn't matter.

MR. LIBRETTI: Well, the only other one was on page 17, paragraph two. Instead of June '91, it should be January.

THE COURT: Oh, very well. I'll consider that as being a correction that has been made.

Your last drug transaction was in January 1991.

MR. LIBRETTI: Yes.

THE COURT: Very well. Now, Mr. Libretti, I'll be glad to hear what you have to say on your own behalf as to why you should not be sentenced or in mitigation of sentence.

[8] MR. LIBRETTI: Well, with that in mind, I'm going to try to avoid going into any legal arguments. That's not my place. I'm just going to read something I've prepared if that's okay.

I have always accepted responsibility for the mistakes I have made and have tried to make the best – I have tried to the best of my ability to make amends and restitution to anyone who has suffered an injury because of my actions. Any damage I have caused I have repaired. My conduct for which I am here today demands no less. I am sorry for the actions which bring me before the Court. I can accept the punishment myself, but it's most difficult knowing the toll on those who love me. I never imagined the effect or devastation my actions would have on my loved ones, especially my family.

The probation department recognizes that my crime is a victimless crime, and I am glad that I have never hurt anyone. However, I feel that there is a social cost associated with drug abuse just as there is with gambling addictions and alcohol and tobacco abuse. As an act of restitution, I would like to provide some service to society in an effort to alleviate some of the costs of drug abuse to the country.

I have no real understanding of drug addiction, [9] I've never been in that situation, and I find it difficult to have a lot of compassion for anyone who admits getting high. His or her highest priority, more important than his or her family and financial obligations. That type of behavior appalls me. And it's probably for this reason I would not make a very good drug counselor. But on – on the many months I've been in jail, I've come to realize that my conduct with controlled substances may have caused or certainly contributed to others' irresponsibility with drugs. And that does trouble – that does trouble me. That was never my intent.

However, as of this moment, over 14,000 children are orphaned due to their parents dying of AIDS. In just a little over seven years, in the year 2000, 82,000 children will be orphaned due to their parents dying of AIDS. Who's going to take care of these children? I have great compassion for these orphaned children. Many of the victims of AIDS contracted AIDS through IV drug use. I would like to take care of these children with no parents.

This is probably the best form of restitution I could make. I am asking you to find that the degree of my conduct, viewed in consideration with the conduct

required to fall within the charge of engaging in a [10] continuing criminal enterprise. The need for parity among the defendants with similar records and similar conduct and the need for the sentence imposed may warrant and be better served with a downward departure.

I did break the law and I'd like to make it right. Being in prison won't necessarily make that happen. The considerations and needs that require sentence be imposed may be better served with the sentence in closer parity to the codefendants' sentences.

I realize some of the needs for the sentence imposed have to do with reflecting a seriousness of the offense. I interpret that to mean my conduct, to promote respect for the law and to provide just punishment. To provide for adequate deterrents to criminal conduct to others and myself, and to protect the public, and I'd like to add that I'm not a threat to the public, and even Claudia Porter says so. And I think if anyone would say something bad about me, she probably would.

So, with that, all I ask is that, you know, the purpose of the sentence be kept in mind and perhaps one question that you could answer and keep in mind is what objective is to be served with my incarceration and can that objective be better served with the sentence in [11] closer parity to my codefendants?

I stand ready for acceptance of sentence and all I can ask is for fairness. But fairness to me means a sentence proportionate with my actions and consistent with the actions and sentences of others in this case. And that's what I have to say.

THE COURT: Thank you, Mr. Libretti. I'm sure Mr. Truman has something he'd like to add.

MR. TRUMAN: Your Honor, I do have things I'd like to add. And sometimes, particularly on days like this I have a difficulty speaking and getting my syntax right.

I always hate to come for sentencings. Sentencing is always the hardest day of my calendar, particularly this day so close to holidays. And a year 1992 which will always be the year of Joe Libretti in my life. Since almost February I've represented Joe in one aspect or another and it has not been easy, but it has been interesting and challenging.

Judge, I want to talk a little bit about the Joe Libretti I know because he is an enigma to me. In almost 20 years of the practice of law, exclusively criminal – and I know the Court can feel this too – you think you've seen everything once. You see the good and the bad in people, sometimes the best and the worst [12] of people. Rarely do you see a person that's impossible to figure out.

Judge, I've tried for a year and I find Joe Libretti hard to – to define. In many respects the Joe Libretti I know, I like. In many respects the Joe Libretti I know I admire. There is a down side of his personality, which I don't understand. You look at a fellow whose family, a man couldn't ask for a better family. All families have problems. And the Libretti family is no different. Perhaps one family is too warm and another family is too cold, but a man couldn't ask for a better family. Come to know all of them over this period of time. The sadness of this case that strikes their heart is what I find technically poignant

and has caused Joe such despair that it's the only thing about this case that he can barely stand.

The prospect of years in custody, the shame of what Joe's actions have done, again, the best and the worst, I see a family that forgives him unconditionally, even more than Joe forgives himself, for his bad actions and his granddad and his mom are here today pulling for him. Joe's found it difficult to communicate with them because he is so ashamed and saddened by the predicament that he's put them in.

An enigma to me also is the love that Joe has [13] for his family, and yet his actions of including his brother and some of the monkey business around this crime. It'll be many days before I forget his brother's testimony in the trial and watching him outside in the hall as he broke down sobbing uncontrollably. It will be many days before I forget Joe Libretti steeling his jaw so that he built the shell of armor around himself while his brother testified. And yet I know him well enough to know that his heart was breaking inside. I don't know how Joe came to get in this business. I wish I did. I wish we could fix it, but we can't.

There are several things I do know and that is that Joe, an over achiever, a fellow while he's one of the more intelligent people I've ever represented, goes beyond that by working hard. And while that was such an attribute as a youngster and such an attribute at school, those virtues became detriments when he got in the drug business.

Joe Libretti has always been able to do well no matter what he's done. If he had fastened his star on legitimate legal business, what a powerhouse he'd be.

I am convinced of one thing and I hope the Court hears this. I'm not trying to take accept – to take responsibility away from Joe Libretti. He's earned the hair shirt that he wears today. But I have never in [14] my practice seen a more unusual cast of characters, unusual in the sense that a gifted group of people, somewhat privileged, with a lot of things given to them and futures as bright as anything have thrown it all away.

The week of trial we spent here just showed such devastation for these people and their families. Over the years I've been an adjunct professor at the University of Denver School of Law. University of Denver School of Law is separate, off campus from the University of Denver. But Judge, I am convinced that something happened in the early '80's at the University of Denver Undergraduate School where people like Joe and some of the other cast of characters you've seen came in that cesspool of drug use.

I like to think I'm not naive, but I was shocked by some of the testimony in the investigation that narcotics – and I mean kilos and kilos of narcotics – were available on campus to everybody.

THE COURT: Well, I had a daughter at the University of Denver School of Law during those particular times when Mr. Libretti was in the undergraduate school who did not report to me the conditions that I learned of at the undergraduate school and I, too, was quite surprised.

[15] MR. TRUMAN: The availability and the sociability of narcotics at that period of time, given Joe's unusual virtue of making money, I mean, it's almost a

vice of avarice. It comes close to that and sometimes becomes a vice, came together like a warm and cold front to lead Joe on into this circumstance.

The Joe Libretti who was avaricious and illegal, breaking the law, is in direct contradiction to the Joe Libretti who takes, of all places, a job in Green River, Wyoming, at General Chemical and who exceeds all expectations, and who works 40 hours, 50 hours, and 70 hours a week.

The Joe Libretti drug dealer is not the same Joe Libretti who volunteers time to the Boy Scouts. I don't understand the difference. It's impossible for me to reconcile those people and I hope that Joe has a chance to understand how he is both people at once.

Of all the drug dealers I've represented over all the years, Joe Libretti is the only person who didn't enjoy a bit of it. Of all the money that he made – and that's a factual dispute – but of all the money he made, he didn't enjoy a bit of it. That's incongruous with the narcotics dealers that I've known in the past. They're high livers. Joe Libretti wasn't even the highest liver in Green River, Wyoming. No [16] vacations, no unusual, crazy purchases. There was something in Joe that made him squirrel these things away. I wish I understood that. I'd like to provide some insight to Joe about that. I've tried, and I can't. I don't understand.

I need to talk briefly now that I talked about Joe about the cast of characters here, and again, this is an unusual case. It's unusual from my standpoint where Mr. Sabell and Mr. Urso are above Mr. Libretti in the chain.

Clearly, Mr. Libretti says that among other people early, but certainly during the last days of the enterprise, he buys narcotics from Sabell and Urso. Sabell and Urso even get together in a cabal, it's my understanding, to set the price on Mr. Libretti. Those people cooperate with the government, the Court has sentenced them, the Court knows what they received. Mr. Libretti, in many conversations with me, says, "How can I be the king pin? They sold me dope. I know they were selling other people dope. I don't understand." The cast of characters –

May it please the Court.

THE COURT: Please proceed.

MR. TRUMAN: The cast of characters also include Brian Urso, whose records lead as long a rap [17] sheet – he cooperates with the government and again Mr. Libretti says, "How can this be?"

The cast of characters also involves Mr. John Biggs. And I need to watch myself or I could go on and on about John Biggs. John Biggs testified in front of the grand jury and later took back some of the more colorful testimony. Many would think that's at least a contradiction, something, perjury. Irrespective of that, Your Honor, he gave information against Joseph Libretti.

Mr. Schlosser and Mr. Dixon, the Court knows about those people as well. Again, it will be many days before I forgive Mr. Dixon as a result of the aneurism. And the Court may recall my asking him a question about a dirt nap and his reaction when he began to laugh almost uncontrollably.

A lot of things have been said here, Your Honor, that aren't true. I wish I knew which were. I wish I knew which Joe told me was true and these other people told the grand jury and the Court that were true. I think that there has to be some coincidence here, but it's hard for me to reconcile with all of the stories that have gone on and on.

I am, in my heart – and I guess this is my opinion – convinced that Joe Libretti never tried to [18] hurt anybody. Throughout the discovery part of this case, we kept hearing about Joe Libretti saying he was going to have Mr. Carson killed or Joe Libretti saying he's going to kill Mr. Rivera. And the Court may recall in the discussion here it was Dixon who testified that he threatened Carson with Libretti using him as a hammer, but that Libretti never – it's my understanding of the testimony, that Mr. Rivera felt threatened but there had never been any threat.

In fact, the Court may remember the unusual circumstance of Rivera armed, going to Mr. Libretti's house to confront him, and walking away without circumstance. Of all the things in this case that we've had disagreement with the government's evidence, Joe Libretti has consistently and adamantly said, "I've never tried to hurt anybody. I would never try to hurt anyone." Your Honor, it's a terribly difficult case.

May I have a moment?

THE COURT: Surely. Now, please proceed.

MR. TRUMAN: Thank you for the moment, Your Honor. Your Honor, also, like no other drug dealer

that I've known, Mr. Libretti continues to work all the time. It seems like most time he was working and enterprising. He made legitimate money. That money came into his bank account, probably was intermingled with other things. [19] It's hard to sort out which was which. But he continued to have gainful employment and was a work-a-day guy. I find that unusual.

Your Honor, of course all that's for naught, because as a result of this, the forfeiture is going to take regular money and illegal money under the substitute assets. All those years that he's worked. Maybe that which he's loved most dearly next to his family, those dollars for whatever reason are going to be taken from him by the government. Mr. Libretti has a lot of questions about that. It's a harsh law. Both the CCE law and the forfeiture law is a harsh law. It's a bitter pill dealt by Congress, but it's a pill we must swallow.

Here, Your Honor, Mr. Libretti believes that in light of his conduct and the sentences of the others, that Mr. Libretti seeks whatever fairness the Court gives in mitigation under the statute.

THE COURT: Thank you, Mr. Truman.

Miss Woodhouse?

MS. WOODHOUSE: Your Honor, I'd just make a short comment. As far as the sentences of the other defendants, I'd like to remind the Court that within weeks after they were charged, they came forward and admitted their responsibility and culpability. They [20] gave us complete debriefings of all the information they

had in this case very early on and continued to cooperate with us throughout the investigation.

Unfortunately, you didn't get to hear all of the testimony of all the defendants and so you don't know that they all corroborated – the stories basically all fit together.

And the fact that Mr. Dixon laughed at the dirt nap shows that he was not coached to say, "Oh, yes, I heard about a dirt nap." These people were testifying honestly from their own point of view and the things that they heard, and I believe that the Court had an opportunity to see that, at least in the instance of Mr. Dixon. Therefore I don't believe there is too much comparison with Mr. Libretti who's continued to deny responsibility up through the first week of trial and even then has taken sort of a half – "I will accept this half of the responsibility." And I believe that he certainly is deserving of the 20-year mandatory minimum sentence.

THE COURT: Thank you, Miss Woodhouse.

MS. WOODHOUSE: Your Honor, we also have a motion for the forfeiture order and we can deal with that at the end.

THE COURT: I think I have no alternative but [21] to grant the forfeiture order and it is hereby granted.

Mr. Libretti, I have considered the presentence report and, of course, also taken into account all the things that you said. I find there's hardly anything in – as to what Mr. Truman has said with which I don't agree. I question, maybe, in some ways the timing of this sentencing just before Christmas, and yet I feel that it's for your own

advantage that you get out of the county jail and get to the institution where you are going to be and to get on with that life.

I have been to most of the institutions west of the Mississippi to see for myself what they are like and I have generally observed that there are people who work in the prison industries like yourself, can be accountants for them and do meaningful work in those places you obviously can't do in the county jail. And I think you ought to get on about it. So that's the justification for this kind of sentencing.

Plus the fact there is also a day that I had some time – yes, Mr. Truman, you're right, there is nothing harder than a sentencing. And throughout the years that I've been on this bench, I have devoutly prayed that I may be a wise and just judge. And yet when I come up against a mandatory minimum guideline sentence, I do indeed agree that they are harsh and it [22] is not equitable. And I am glad that Judge Keene of Denver and I were the only two in this circuit that spoke against these laws at the time the sentencing commission was considering adopting them, just for that reason.

And I think, Mr. Libretti, that if I were to have the discretion that I used to have before Congress took it away from me, I would make the sentence in this case substantially less. Because I had 29, the years that you should be marrying and having a family and raising some grandchildren for your – and great grandchildren for your mother and grandfather who are here today, you're going to be wasting your time in a prison. And I feel sorry for that – for you for that.

And yet there is no motion to go below the guidelines by the government. In the absence of such a motion, I can't do it. So, therefore, I have no discretion in this matter but to impose the sentence that is required by what I feel are harsh laws.

So, for these reasons, it is the sentence and judgment of this Court that you be committed to the custody of the Attorney General of the United States to be confined in an institution to be designated by him for a period of 240 months and that you shall be given credit thereon for the time that you have been in [23] federal custody awaiting sentence; and that upon your release from confinement, that you shall serve a period of five years of supervised release.

That is not so much a penalty for you as it is to give you a probation officer who will help you in the readjustment process that will be needed. You'll find that the probation officer can be your best friend and is there specifically to help you.

During that period of time that you are serving as well as serving unsupervised release, I am going to impose – because of the large quantities of drugs involved in this case, I think some fine is necessary. I recognize the fact that there has been a forfeiture of almost all of the illicit gains that you achieved.

And I really think that the explanation of this, Mr. Truman, is that here's a bright young man who was competitive, and in the interest of being – achieving on the scene, that he saw the easiest place of quick gains and advancement was the drug scene.

And you know, I'll say this. You were good at it. It's too bad. I agree with Mr. Truman, it's a great shame that your energies weren't channeled on Wall Street, because I think you would be a great success.

However, I am – the recommendation is that I fine you $25,000, but I think that is unfair and too [24] high. I'm going to make it $5,000, so that it's something that you can pay during the time that you are earning money in the prison industry business. And when you're on supervised release, the supervised release shall be under condition that you shall not commit any crimes – federal, state or local – and you are prohibited from having firearms, ammunition, or explosives of any kind from here on out.

Again, you cannot possess any controlled substances and shall abide by the standard conditions of supervised release. But in addition, you shall participate in programs of drug testing and treatment for drugs and alcohol as directed by your probation officer, and shall submit to mandatory testing on demand.

And I'm going to impose on you a requirement of 500 hours of community service. That's in lieu of the other amount of the fine that I have dropped. But I think that the 500 hours of community service will help you in your adjustment process. You'll be doing something for others. And I think that's a good thing for you to do and consider. So I'm going to require that in the course of your supervised release.

With that, Mr. Libretti, you are remanded to the custody of the marshal and you will have to go with [25] him. Good luck. Did you have something further?

MR. LIBRETTI: Are we over?

THE COURT: I think so.

MR. LIBRETTI: Well, then, with that in mind, I would just like to object to what I see as a failure to find any factual basis for the whole forfeiture, just for the record.

THE COURT: Your objection is noted, and I think there is a – the evidence that I heard before me in the two days of trial I think is sufficient to warrant the granting of forfeiture. I think I have no alternative. Anything further?

MS. WOODHOUSE: Nothing further, Your Honor.

THE COURT: Court will stand in recess subject to call.

(Hearing proceedings concluded

11:56 a.m., December 23, 1992.)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

(Caption Omitted In Printing)

ORDER OF FORFEITURE

(Filed Dec. 23, 1992)

WHEREAS, in the Indictment in the above-entitled case, the plaintiff sought forfeiture to the United States of America of specific property of the Defendant, pursuant to 21 U.S.C. § 853:

AND WHEREAS, on October 5, 1992, the Defendant agreed to the forfeiture of any right, title and interest as to him, as to all such property described hereinafter, more specifically described in Count 6 of said Indictment, in Bills of Particulars, and in the United States' motions for Restraining Orders against such property. On that date, the Defendant entered a plea of guilty to the offense listed in Count 6, 21 U.S.C. § 848, and also entered into a plea agreement signed and executed by all the parties in which the Defendant agreed to forfeit all property;

AND WHEREAS, by virtue of said stipulations, agreements, and pleas of guilty, the United States is now entitled to said property, and it should reduce said property to its possession, pursuant to 18 U.S.C. § 848 and 853, and Rule 32(b)(2) of the Federal Rules of Criminal Procedure.

AND WHEREAS, pursuant to 21 U.S.C. § 853(n)(1), the United States is required to publish notice of the order and of its intent to dispose of the property in such

manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have an alleged interest in the property that is the subject of the Order of Forfeiture as a substitute for published notice as to those persons so notified;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That based upon the plea of guilty by the Defendant and the plea agreement entered into by all the parties, the United States is hereby authorized to seize the following property, and all right, title and interest of Joseph V. Libretti, Jr, in and to said property is hereby forfeited to the United States for disposition in accordance with the law, subject to the provisions of 21 U.S.C. § 853(n)(1):

(A) All of that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, located in Township 35 North, Range 118 West, Section 31, Lot 39 of Star Valley Ranch, Plat 10, Lincoln County, Wyoming;

(B) All of that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, located at 9430 West Ontario Drive, Littleton, Colorado 80123, more particularly described as follows: Lot 28, Block 2, Dutch Ridge Subdivision Filing #2, Jefferson County, Colorado, which property is held in the name of Joseph V. Libretti, Jr. and Claude Jay Cismaru;

(C) All of that lot or parcel of land, together with its buildings, improvements, fixtures, attachments and easements, located at 9328 West Ontario Drive, Littleton, Colorado 80123, more particularly described as follows: Lot 133, Block 1, Dutch Ridge Subdivision Filing #1, Exemption Survey #1, Jefferson County, Colorado, which property is held in the name of Joseph V. Libretti, Jr. and Claude Jay Cismaru;

(D) One silver/maroon 1990 Chevrolet 4-wheel drive pickup with camper shell, VIN 1GCDK14KXLZ218430;

(E) One blue 1990 Toyota Celica GTX 2-door VIN JT2ST85N4L0035365;

(F) Eight Thousand Ten Dollars ($8,010) in United States currency, in that such sum in aggregate was received in exchange for the distribution of controlled substances, to-wit: marijuana, a Schedule I controlled substance, and cocaine, a Schedule II controlled substance, beginning on or about January 1, 1982, and continuing to the present, which money is already in the possession of the United States.

(G) One diamond ring given by Defendant to Claudia Porter, which ring has been given to the government by Ms. Porter and relinquished to the United States.

(H) One 1977 Windsor 14' x 70' mobile home VIN 3CRKFKR1HBEA, Title Nos. 04-0427636 and 04-39651 located in Green River, Wyoming, in the name of Joseph V. Libretti, Jr. and any rents or profits received thereon since the entry of the

restraining order in this matter and from the date of this order forward;

(I) One Heckler and Koch, model MP5 SD, 9mm caliber, full automatic machinegun, in brown case, serial # S 98108;

(J) One Heckler and Koch, model HK MP5 SD, 9mm caliber, full automatic machinegun with silencer, serial # 001183, serial # 98-108;

(K) One Heckler and Koch, model HK MPS, 9mm caliber, full automatic machinegun, serial # 69417;

(L) One Heckler and Koch, model HK MP5, 9mm caliber, full automatic machinegun, serial # 82563;

(M) One Heckler and Koch, model HK MP5, 9mm caliber, full automatic machinegun, serial # 69415;

(N) One Heckler and Koch, model MP5, 9mm caliber, full automatic machinegun, serial # 43-13132;

(O) One Heckler and Koch, model MP5, 9mm caliber, full automatic machinegun, serial # 12433;

(P) One Action Arms, UZI Frame, 9mm caliber, model-A rifle, serial #SA 28093;

(Q) Customer Account Number 008-666555, an IRA savings account, in the name of Joseph V. Libretti, Jr. managed by Columbia Savings, 5850 South Ulster Circle East, Englewood, CO 80111, (telephone number 303-773-3444);

(R) Customer Account Number 60-09495, in the name of Joseph V. Libretti, Jr. managed by Vectra Bank of Lakewood, CO 80215, (telephone number 303-233-8400);

(S) Customer Account Number 1423258, in the name of Claudia Porter acting at the direction and on behalf of Joseph V. Libretti, Jr. managed by State Bank of Green River, 125 W. Flaming Gorge Way, Green River, WY 82935, (telephone number 307-875-7930);

(T) Customer Account Number 429-43-221, in the name of Dee Smith d/b/a Legal Research, Ltd. acting at the direction and on behalf of Joseph V. Libretti, Jr., at Cole Taylor Bank, 350 West Dundee, Wheeling, IL 60090;

(U) Customer Account Number 38103-8 in the name of Joseph V. Libretti, Jr. Beverly E. Libretti, and Joseph V. Libretti at a bank formerly known as First Federal Savings and Loan Association of Des Plaines now known as First Federal Bank for Saving, 749 Lee Street, Des Plaines, IL;

(V) Customer Account Number 460079767 in the name of Joseph V. Libretti Jr. and Joseph V. Libretti at a bank formerly known as North West Federal Savings and Loan Association of Chicago now known as LaSalle Talman Bank, 4901 West Irving Park Road, Chicago, IL 60641;

(W) Customer Account Number 16-11524406 in the name of Joseph V. Libretti, Jr. managed by RAF Financial Corporation, 717 17th Street, Suite 2900, Denver, CO 80202,

(telephone number 303-292-1400), which consists of:

(1) municipal bonds in the amount of approximately $5,166.00 issued by Castle Pines North Net District at 9.75%; and

(2) municipal bonds in the amount of approximately $9,413.00 issued by FHLM Group at 8.25%;

(X) GNMA Customer Pool Number 002941X in the name of Joseph V. Libretti, Jr., certificate number 30296455F managed by Barclay's American Mortgage Corporation, 5032 Parkway Plaza Boulevard, P.O. Box 33213, Charlotte, NC 28233, (telephone number 704-357-7600);

(Y) GNMA Customer Pool Number 6994 in the name of Joseph V. Libretti, Jr., certificate 2799045SF managed by Seattle Mortgage, 229 Queen Anne Avenue North, P.O. Box C, Seattle, WA 98109; including the principal and the following interest checks:

Check No.	Date	Sequence No.	Amount
026583	1/15/92	026583	$ 47.42
025597	2/15/92	025597	196.31
026583	3/15/92	026583	47.42
027565	4/15/92	027565	71.51;

(Z) One First Federal Bank for Savings Cashier's Check #036886, dated November 15, 1991, in the amount of $542;

(AA) One First Federal Bank for Savings Cashier's Check #036885, dated November 15, 1991, in the amount of $250;

(BB) One First Federal Bank for Savings Cashier's Check #036887, dated November 15, 1991, in the amount of $2,890;

(CC) Vectra Bank of Lakewood Cashier's Check #21308, dated July 22, 1991 in the amount of $28,900.00;

(DD) Vectra Bank of Lakewood Cashier's Check #21566, dated August 23, 1991, in the amount of $65,000.00;

(EE) Bankamerica Travelers Check #34 208 802 676 for $50.00 in the name of Joseph V. Libretti, Jr.;

(FF) Bankamerica Travelers Check #334 208 802 677 for $50.00 in the name of Joseph V. Libretti, Jr.;

(GG) Bankamerica Travelers Check #34 208 802 678 for $50.00 in the name of Joseph V. Libretti, Jr.;

(HH) Bankamerica Travelers Check #34 208 802 679 for $50.00 in the name of Joseph V. Libretti, Jr.;

(II) American Express Travelers Check #HH190-845-770 for $50.00 in the name of Joseph V. Libretti, Jr.;

(JJ) American Express Travelers Check #HH190-845-771 for $50.00 in the name of Joseph V. Libretti, Jr.;

(KK) American Express Travelers Check #HH190-845-772 for $50.00 in the name of Joseph V. Libretti, Jr.;

(LL) American Express Travelers Check #HH190-845-773 for $50.00 in the name of Joseph V. Libretti, Jr.;

(MM) American Express Travelers Check #HH190-845-774 for $50.00 in the name of Joseph V. Libretti, Jr.;

(NN) That a check be reissued in the amount of $8,416.23 to the United States, replacing a Mellon Bank, N.A., Pittsburgh, Pennsylvania, Check number 0010502312, dated April 2, 1992, issued to Joseph V. Libretti in the amount of $8,416.23, which sum represents Defendant's 401K savings in connection with his position at General Chemical, to be forfeited as substitute assets for assets dissipated and otherwise expended by Libretti. Notification hereof is to be provided to General Chemical Corp., 90 East Halsey Road, Parsippony, New Jersey 07054, Attn: Susan Degrosky;

2. That this Court further ORDERS that the ownership of the Defendant in all Defendant's firearms and accessories not specifically named herein be and it hereby is abandoned to the Wyoming Division of Criminal Investigation of the Wyoming Attorney General's Office;

3. That the United States Marshal is hereby ORDERED to record forthwith a copy of this Order in the county where each of the above-described real properties are located, and which Order, when recorded, shall be notice to any transferee or potential transferees, of the interest of the United States of America therein;

4. That all of the aforementioned forfeited property described above in paragraph 1 of this Order is to be held

by the United States Marshals Service, and all that abandoned property described in paragraph 2 of this Order is to be held by the Wyoming Attorney General's Division of Criminal Investigation, as indicated, in their secure custody and control.

5. That pursuant to 21 U.S.C. § 853(n)(1), the United States Marshal forthwith shall publish at least once for three successive weeks in a newspaper of general circulation in Sweetwater County, and in each county where forfeited real property is located, notice of this Order, notice of the Marshal's intent to dispose of the property in such manner as the Attorney General may direct, and notice that any person, other than the Defendant, having or claiming a legal interest in any of the above-listed forfeited property must file a petition with the court within thirty (30) days of the final publication of notice or of receipt of actual notice, whichever is earlier.

This notice shall state that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the property, shall be signed by the petitioner under penalty of perjury, and shall set forth the nature and extent of the petitioner's right, title or interest in each of the forfeited properties and any additional fact supporting the petitioner's claim and the relief sought.

The United States may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the Order of Forfeiture, as a substitute for published notice as to those persons so notified; and

6. That upon adjudication of any and all third-party interests, the Court shall amend this Order of Forfeiture

pursuant to 21 U.S.C. § 853(n)(6), addressing all such third-party interests.

ORDERED this 23d day of December, 1992.

/s/ Illegible
UNITED STATES DISTRICT
COURT JUDGE

Presented by:

RICHARD A. STACY
United States Attorney

/s/ Louis Piccioni for Gay Woodhouse
GAY WOODHOUSE
Assistant United States Attorney

UNITED STATES DISTRICT COURT

DISTRICT OF WYOMING

UNITED STATES OF AMERICA

V.

JOSEPH V. LIBRETTI, JR.

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

CASE NUMBER: 92CR006-01B

CRAIG TRUMAN, LINDA MILLER
Defendant's Attorney

(Filed Dec. 23, 1992)

THE DEFENDANT:

pleaded guilty to count(s) 6 OF A SUPERSEDING INDICTMENT.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section
21:848

Nature of Offense
Continuing Criminal Enterprise

Count Number(s)
Count 6

The defendant is sentenced as provided in pages 2 through of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:
350-64-2663

Defendant's mailing address:
Laramie County Jail
Cheyenne, WY 82001

Defendant's residence address:

December 23, 1992
Date of Imposition of Sentence

/s/ Clarence A. Brimmer
Signature of Judicial Officer

Clarence A. Brimmer, U.S. District Judge
Name & Title of Judicial Officer

December 23, 1992
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of two hundred forty (240) months. Defendant shall participate in the Inmate Financial Responsibility Program regarding the fine and special assessment imposed by this Court.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on ___ to ___ at ___, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years.

While on supervised release, the defendant shall not commit another Federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this Court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions.,

The defendant shall not use or possess a firearm, ammunition, dangerous weapons or destructive device. Supervised release shall be revoked for possession of a firearm.

Defendant shall not use or possess any illegal drugs or controlled substances. Supervised release shall be revoked for possession of illegal drugs or controlled substances.

Defendant shall participate in drug and alcohol treatment programs as directed by the U.S. Probation Office.

Defendant shall submit to urinalysis testing as directed by the U.S. Probation Office.

Defendant shall contribute 500 hours of community service as directed by the U.S. Probation Office.

Defendant shall pay any remaining balance of the $5,000.00 fine imposed by this Court as directed by the U.S. Probation Office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) the defendant shall not leave the judicial district without the permission of the Court of probation officer;
2) the defendant shall report to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm

the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this judgment.

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $5050.00, consisting of a fine of $5000.00 and a special assessment of $50.00.

These amounts are the totals of the fines and assessments imposed on individual counts as follows:

Count 6 – Fine $5,000.00; Special Assessment $50.00

This sum shall be paid while defendant is incarcerated and any remaining balance shall be paid during the term of supervised release as directed by the U.S. Probation Office.

(Caption Omitted In Printing)

==========

DEFENDANT'S AFFIDAVIT IN SUPPORT OF THIRD PARTY CLAIMANT CLAUDIA PORTER'S MOTION FOR RETURN OF PROPERTY PURSUANT TO TITLE 21 U.S.C. § 853(n)(6)(A)

(Filed Jan. 22, 1993)

==========

Joseph V. Libretti, Jr., under the penalty of perjury states:

1. I am the defendant in the above entitled criminal case. I make this affidavit in support of Claudia Porter's motion and petition for return of her diamond engagement ring set.

* * *

8. Joseph V. Libretti, Jr. was gainfully employed as an accountant at General Chemical from June 1, 1989 through December 1991. In the 30 months prior to my arrest I earned approximately $110,000.00 working as an accounting supervisor at General Chemical.

9. In 1989 and 1990 combined I earned and reported over $60,000.00 in legitimate revenues and income from additional sources. These income sources included rental real estate, my firearms business, investments, and gambling.

EXHIBIT 2 W-2 FORM

01 62 7500 350642663

1	22222	For Official Use Only ▸
382		

2

GENERAL CHEMICAL
90 E. HALSEY RD.
PARSIPPANY, NJ 07054

		X	
		8533.84	52904.89
22-2689817	027095-01-8	2955.29	47665.89
350-64-2663			47665.89

19a

JOSEPH V LIBREITI — 691.16

800 WILDERNESS TR

GREEN RIVER WY 82935

19b

20

21 25 29

Copy A For Social Security Administration

Dept. of the Treasury—Internal Revenue Service

Form W-2 Wage and Tax Statement 1991

For Paperwork Reduction Act Notice, see separate instructions

172

BEST AVAILABLE COPY

[TRANSCRIPT OF PROCEEDINGS, HEARING
FEB. 9, 1993]

* * *

[13] THE COURT: The question is: Miss Woodhouse just informed the court that the United States has a pending offer to purchase it, and that the co-owner thinks it should be done, the United States thinks it should be done, and if it isn't sold it will be forfeited pursuant to the mortgage and nobody will get anything out of it.

So the question is: Shouldn't the sale be consummated?

DEFENDANT LIBRETTI: Well, first of all, um, I would like to ask if I could be entitled to representation here today.

THE COURT: At this hearing?

DEFENDANT LIBRETTI: At this hearing.

THE COURT: As I understand you have filed these matters pro se, and Mr. Truman has withdrawn.

DEFENDANT LIBRETTI: And that's why I filed them pro se, because I could not afford counsel due to my indigency.

THE COURT: These are matters that don't really relate to your criminal suit except incidentally. I am not sure if you are entitled to counsel being appointed or not.

DEFENDANT LIBRETTI: Then, I guess, at this late [14] date I would like to request appointment of counsel under, I believe it is, Title 28 USC 1915(d).

THE COURT: I will take that under advisement.

DEFENDANT LIBRETTI: Thank you.

THE COURT: In the meantime, tell me what your position is on this.

DEFENDANT LIBRETTI: Well, when I was being represented by Mr. Truman I received a letter after trial that had been sent before trial from Mr. Cismaru saying that I should give him power of attorney for him to sell this real estate, but Mr. Truman said that the government had some type of hold over it, and I don't know that much about it.

Did they file some type of injunction, or restraining order, or something like that?

MS. WOODHOUSE: Yes, we did, Your Honor.

THE COURT: What was done, Miss Woodhouse?

MS. WOODHOUSE: Early on in the proceedings, after indictment, we obtained a restraining order prohibiting diminution or waste of the properties. We would have agreed to a sale if the other parties had agreed to it, but Mr. Libretti did not do so.

DEFENDANT LIBRETTI: I was never approached, Your Honor.

MS. WOODHOUSE: We had an interest at that time [15] of doing that.

DEFENDANT LIBRETTI: I don't know what she is talking about; I didn't agree to any sale, I am not

aware of that ever coming up. This is the first I have heard about a sale of the condominium.

MS. WOODHOUSE: Your Honor, it is not his condominium anymore. You did enter an order of forfeiture as to 50 percent of that condominium in December, and we are simply trying to make sure we can have a sale of that in agreement with the other 50 percent owner.

DEFENDANT LIBRETTI: I have to dispute that again, Your Honor. I wasn't aware that that condominium was included in any forfeiture. There certainly are no proceeds derived directly or indirectly from a violation of Title 21.

THE COURT: The order of forfeiture has been entered in this case. I'm sure you have received a copy of it.

DEFENDANT LIBRETTI: I did not get a copy of that order of forfeiture until I filed my appeal, and much after that, and I had never seen it before. And I had not seen it at the time of the plea agreement.

THE COURT: You have seen it?

DEFENDANT LIBRETTI: Yes. Craig Truman mailed me a copy well after the sentencing even. I had not seen that [16] at the time I entered the plea agreement.

THE COURT: I have just got the last volume of your file in front of me, and I am not sure if that contains the order or not.

MS. WOODHOUSE: It was filed on the 23rd of December, Your Honor.

THE COURT: Let me get up to December.

MS. WOODHOUSE: Your Honor, we dealt with this matter of stay, and I believe Mr. Libretti is not entitled to a stay.

THE COURT: Yes, I have a copy of the order of forfeiture that was filed December 23rd, 1992, and I remember that order, which does forfeit the various items of property that are listed therein.

Was this condominium one of those items?

MS. WOODHOUSE: Yes, it is, Your Honor. I believe it is item (B).

THE COURT: Item (B)?

MS. WOODHOUSE: Yes.

THE COURT: Yes, that's the one that's owned jointly with Mr. Cismaru.

MS. WOODHOUSE: There are two such properties, Your Honor, both are in the early stages of foreclosure, and we will probably be attempting to sell both.

THE COURT: I am going to rule that the United [17] States may do what is financially prudent in this matter rather than go through a mortgage foreclosure. If you can effect a sale that will recover some sort of value out of that you can certainly go ahead and effect the sale.

And you can retain the proceeds of the sale subject to any further interest that Mr. Libretti may wish to assert in that. And we can argue about that later, but in the meantime I see no point in missing a sale.

MS. WOODHOUSE: Thank you, Your Honor.

THE COURT: So let's do that.

MS. WOODHOUSE: As to the stay, though, Your Honor, any proceeds that are obtained during the pendency of his appeal can be returned to him if he wins his appeal on the forfeiture issue, so the stay at this point is not appropriate. It would deny third-party creditors their rights. And he is not a person – it says in 854(n) that the application must be by a person other than the defendant.

THE COURT: Have you got any other pieces of property that are about to be sold –

MS. WOODHOUSE: No.

THE COURT: – or will be sold between now and March 26th?

MS. WOODHOUSE: No, just those two, Your Honor.

THE COURT: Then I don't think it will harm a [18] thing to maintain the status quo pending the hearing.

MS. WOODHOUSE: Well, Your Honor, if he has a stay that means that we cannot accept checks from the banks, you know, in satisfaction of the amounts that are outstanding there that are in your order.

THE COURT: Oh, that doesn't say that. All you are stayed from is from disposing of any of the property that is on hand. In other words, you can't put it beyond the reach of the court.

MS. WOODHOUSE: Your Honor, if it is a stay pursuant to this act it would prevent us from having an ancillary hearing.

THE COURT: But that isn't the kind of a stay that I am granting. I am just saying that the United States pending this hearing of March 26th shall preserve the status quo, except as to these two condominiums, which I have given you permission to sell, provided you maintain – provided you are able to account to the court for the proceeds.

MS. WOODHOUSE: Your Honor, are we permitted to give Mr. Cismaru his share of any profits from that sale?

THE COURT: Oh, sure. Yes. You have got to do that or you can't effect the sale. Cismaru certainly wouldn't sell unless he didn't get his share.

MS. WOODHOUSE: All right. So you are just [19] instructing us basically to preserve the status quo until the 26th of March?

THE COURT: Yes. And on the 26th of March anybody that has any claims against this may appear in court and we will hear them and determine what is said. And before that time I will decide whether or not – I will check into it to see whether or not you are entitled to a court-appointed attorney.

Considering the fact that all of your assets have been forfeited it looks like you probably are.

DEFENDANT LIBRETTI: Not only that, but my legal documents are continually confiscated almost on a biweekly basis now. I really have no – I have been denied

access to a law library the last four days, and I have been denied medical attention. I can barely stand right now. I am under doctor's orders to get Motrin three times a day, and I have been requesting it where I have been incarcerated, and they continually deny it to me.

THE COURT: We will ask the marshal to give him the medical attention that he needs.

MARSHAL NO. 1: Your Honor, he was in the Albany County jail for the last four days because we didn't have room here, and now he is here, and we can take care of it.

THE COURT: Keep him here and then he can get proper attention. I am not sure if he will get it in [20] Albany County.

MARSHAL NO. 1: Yes.

THE COURT: And here they have got a law library in the county jail, too, such as it is.

DEFENDANT LIBRETTI: I have to object to the adequacy of their almost nonexistent law library. They don't even get Federal 2d's.

THE COURT: I have expected it isn't the greatest, but it is better than nothing, I guess.

DEFENDANT LIBRETTI: They don't get Federal 2d's or Federal Supplements.

THE COURT: Yes, I am afraid you are right.

MS. WOODHOUSE: Your Honor –

THE COURT: Maybe they can borrow one for you maybe.

MS. WOODHOUSE: Just for your information, because Mr. Libretti is not a third party, as would be defined by this act, he will not be heard at the ancillary hearing, only other people, and the third parties you named that we will be sending notice to and already have served with the notice will be appearing at that hearing.

THE COURT: I am going to hear Mr. Libretti, too. He is the one who has all of these motions filed.

MS. WOODHOUSE: They are not valid motions, Your Honor; he is not the third party.

[21] DEFENDANT LIBRETTI: Your Honor –

MS. WOODHOUSE: They haven't been filed properly

DEFENDANT LIBRETTI: Your Honor, may I say something?

THE COURT: Yes, of course.

DEFENDANT LIBRETTI: What I am filing for has a lot to do with page 16, Exhibit 1 of the motion. I am not stating my interest in these properties, I am stating my right to protect my credit rating, which affects my financial interests in the future.

And I have more evidence today, but it was confiscated, and I wanted to present that. Had I known that we were going to be hearing this motion today I would have fought harder to bring that evidence with me. It is at the Laramie County Detention Center, and it was confiscated from me.

THE COURT: Well, Mr. Marshal, get his property and bring it here so that he can have it with him, so

that the next time he shows up he will have it. Whoever has got it ought to have the papers in court.

DEFENDANT LIBRETTI: It is all over the country, Your Honor. Some of it was confiscated in Phoenix already.

MARSHAL NO. 2: Your Honor, I have to defend the Marshal's Service here. He knows full well all our [22] policies on prisoner property, where it is supposed to be mailed, how it is supposed to be sent, and he didn't do it properly. When it is transferred somewhere it has to be mailed, it can't go on our plane. And he has traveled all over the country.

THE COURT: Well, I don't know anything about that, all I say is that he is entitled to have copies of his pleadings.

MARSHAL NO. 2: We will find them.

THE COURT: Find them and get them to him.

MARSHALL NO. 2: We will find his legal papers.

DEFENDANT LIBRETTI: Anyway, I am not an attorney, so I am going to say this the best I can. I read this interesting case, I believe it was Singleton v. Wolf, about a doctor who could assert his patient's right to get an abortion because it affected him financially, and very simply if the patient can't get an abortion then he can't get paid.

Well, in my case if creditors like AT&T aren't paid off in the future I won't be able to get a job, buy a home,

obtain credit, or if I can obtain credit it will be at a higher rate than it need be due to the fact that –

THE COURT: As a practical matter, Mr. Libretti, I don't think that that's really a particularly valid argument. AT&T's $4800 will probably be written off long [23] before you get out of jail.

DEFENDANT LIBRETTI: Well, that's fine, but it certainly is going to be a black mark on my credit rating report, and that's the evidence that I was going to present to you today.

THE COURT: But compared to the black mark of a conviction that's really only a shade of gray.

DEFENDANT LIBRETTI: Well, I don't believe my conviction affects my ability to – or my trustworthiness and my reputation, like I have never owed anybody any money that I haven't paid them. And this would be the first time.

THE COURT: You certainly have got a good explanation, you can't pay if people have confiscated your property and took everything from you, so you couldn't.

So as far as that goes it isn't the strongest argument, but I think you can certainly be in a position to show that you have attempted to get payment for your creditors, and that shows your good faith in this matter.

I would consider that if I were one of your creditors.

DEFENDANT LIBRETTI: Well, I believe it would look better if it was paid.

THE COURT: It would be better if it was paid, I agree with you there. All I want to do is give everybody a [24] chance to be heard.

DEFENDANT LIBRETTI: Okay.

* * *

[28] MS. WOODHOUSE: Your Honor, because it is unusual, if not unprecedented, to have a defendant appear at an ancillary hearing, we would like to know what you are going to allow Mr. Libretti to address at that hearing.

THE COURT: Whatever fairness seems to require.

MS. WOODHOUSE: So you will allow him to appear on behalf of the third-party creditors?

THE COURT: I am going to allow Mr. Libretti to appear at the hearing, I am going to allow him to say what he thinks he needs to say. I will hear him. That's the purpose of this.

He, too, has an interest in this matter.

* * *

[TRANSCRIPT OF PROCEEDINGS HEARING MAR. 26, 1993]

(Examination Of Claudia Porter)

[11] Q. All right. Do you have anything else to add onto this property?

A. There was also an engagement ring that was taken.

Q. I was going to ask you about that. Tell me about it.

A. Well, when Joe and I decided that we were going to get married, we went together to design this engagement ring.

Q. When was the engagement ring given to you?

A. Would have been October of '90, I belief.

Q. '91?

A. I am not very good with dates, obviously.

Q. Same year as the Wyochem account was transferred?

A. It was a year before.

Q. In 1990?

A. (Witness nods head up and down.)

Q. All right. And tell me about it.

A. Well, it was given to me.

Q. Did you go with him to buy it?

[12] A. No. The diamond was purchased separately and he gave me the diamond then we went together to

design the ring itself to a place called Purvis Jewelers in Denver.

Q. I see. Were you aware of the financing of it?

A. I knew that he had charged the setting itself on his credit card.

Q. All right. And how about the stone?

A. That I don't know.

Q. As far as you know, it was an outright gift?

A. Yes, Your Honor.

Q. Did you have any reason whatsoever to believe that this gift was the product of drug money?

A. No, Your Honor.

• • •

[38] Q. (BY MR. O'DONNELL) All right. And the ring was the year prior to that, approximately in October of '90 or '89 – '90. Excuse me.

Now I gathered from your testimony in answer to Miss Woodhouse's questions that you had some indication at various times during your relationship with Mr. Libretti that there was something going on that should not be going on?

A. That's correct.

Q. Did you, however, regarding these two pieces of property have any knowledge that there was any drug money involved in their purchase or acquisition?

A. No, I did not.

[39] Q. The $1333 that remained of the $9300 was yours to use as you saw fit?

A. That's correct.

Q. Would you characterize that as a gift from Mr. Libretti to you?

A. Yes I would.

Q. And would you, likewise, characterize the ring as a gift from Mr. Libretti to you?

A. Yes.

MR. O'DONNELL: That's all I have. Thank you.

THE COURT: Miss Woodhouse?

RECROSS-EXAMINATION

Q. (BY MS. WOODHOUSE) Miss Porter, isn't it true that you actually turned that ring over to Toni Young, gave it to him?

A. I was cooperating with Toni Young, yes.

Q. And you gave it to him?

A. Yes, I did.

Q. And at the time you gave it to him, you said you knew it was at that particular time tainted and you didn't want anything to do with it?

A. No. I didn't say that.

Q. You said you knew that the defendant had drug you into this thing and you didn't want to be any part of it?

[40] A. I was angry at the time and the engagement ring lost some of it's value as far as being the love that was attached to that, yes. But I did not state that I thought it was bought with tainted money and I didn't want anything to do with it. I was tired of the whole ordeal and very worn out.

Q. And you wanted to get rid of it?

A. No. I did not want to get rid of it. He asked for it and I was willing to give it to him.

* * *

[41] BEVERLY LIBRETTI,

called for examination on her own behalf, having been first duly sworn under oath, testified as follows:

EXAMINATION

Q. (BY THE COURT) All right, now, what claims are you making?

A. There are two bank account books.

Q. And these are the –

A. One is.

Q. –the account books? I've forgotten the names.

A. One is from First Federal Savings and Loan of Des Plaines.

Q. First Federal?

A. And one is from a bank called –

Q. That was in Des Plaines, wasn't it?

A. Yes. It has a different name now. Actually, I thought I saw it here.

Q. Let's see, there is a Des Plaines account and a LaSalle and Talman account.

[42] Go ahead and tell me about them, Mrs. Libretti.

A. Oh, okay. I thought I saw it in here, but now I don't. Well the bank book from First Federal Savings and Loan has my husband's Social Security number on it. It was opened when Joe, Jr. was very small. We opened two accounts, one for our daughter and one for him. And it was a bank that my husband and I – our savings.

Q. What you are saying is that the money that went into it didn't really come from drugs.

A. It has absolutely nothing related to this. When all this happened, my husband was asked to send anything that we had that had Joe, Jr.'s name on it and we happened to have those two books. And I'm certain Joe, Jr., never was not even aware of this savings account at First Federal.

Q. This is just something –

Well, he was very little and we opened one for my daughter and one for him.

Q. How much are we talking about?

A. I have no idea. I don't take care of the banking or any of the money in our house, but when he was little

and he got birthday money, maybe allowance money, confirmation money, this is where it went. Perhaps I did take him up and he put it in. And since he went away from college – then when he was in high school he [43] opened his own account at the –

Q. That was the LaSalle-Talman?

A. Right.

Q. And he opened it in high school?

A. Right. Because it was about four blocks from our home. He could ride his bike there, deposit his own money, take it out, do what he wanted to with it. But this First Federal one I am certain he really does not even remember it. The reason I don't think he remembers it is because this summer our daughter was home for a few months and she was going on a trip and she needed traveler's checks, and I said, "Oh, our First Federal Savings will give them free to their customers. I will go up with you." And my husband said, "Well, why don't we just give her that bank book that's hers?" And she was absolutely delighted. She had no recollection of it and she had about $700 extra to spend on her vacation. And we have the same kind of a book for Joe, Jr. And I'm sure that – I'm sure he didn't even remember that.

Q. Probably about the same amount?

A. I – probably. I really honestly have no amount.

Q. You treat them both alike?

A. My husband would go up and put the interest on them and he always paid the taxes on them, but I don't

do any [44] of the financial stuff in our family, so I have no idea.

I know it's not great amounts and the Talman bank, that was his. So I don't know how much was in there and I know that he bought a car his first Christmas home from college, and I know he took money out. I think that's where the money came from. And that's all I know about that and I don't know – I'm sure there aren't great amounts in there either.

Q. Now, is there other property to which you are making claim?

A. Joe, Jr., wants us to have the land.

Q. The Star Valley Ranch lot?

A. Yes. I've never seen it. But when all this came about in December, his father –

Q. Am I correct in my assumption that the doctor, your husband, is very busy and couldn't come out himself and so he sent you in his place?

A. Yes. That's correct. He is in a practice with other people and there are other people on vacation.

Q. You are speaking on behalf of him and you both?

A. So I am speaking for him also, yes.

Q. And tell me about the ranch. transfer.

A. Well, when this happened my husband gave money for an attorney to represent Joe.

Q. That would be for Mr. Truman?

[45] A. Yes. And Joe, Jr., wanted to repay his father, and this is my understanding of it, the only money or the only thing he knew to do at the time was he knew he had this land and so he turned it over to his father.

Q. Did you and the doctor know at this time that the lot had been purchased with drug proceeds?

A. Absolutely not.

Q. You didn't know where it came from, I presume.

A. No. We knew he had a Lakewood Firearms business, but we knew nothing about drugs until all this has come out now.

Q. You knew he was also working, I presume?

A. Yes. He's always worked. He's loved to work.

Q. So, you felt that he had two sources of legitimate income?

A. Yes.

Q. The firearm business?

A. Lakewood Firearms and General Chemists.

Q. And General Chemical Company?

A. Yes.

Q. Anything further?

A. No.

THE COURT: All right. Perhaps you'd like to take the witness stand, Mrs. Libretti, and let counsel cross-examine you and we will proceed further.

[46] CROSS-EXAMINATION

Q. (BY MS. WOODHOUSE) Mrs. Libretti, if I understood your testimony concerning the two accounts, you're not saying that you actually – you or your husband have an interest in those accounts personally?

A. Well, yes, we want them back. I especially want the First Federal Savings & Loan one back. It has my husband's social security number on it. What went in there has absolutely nothing to do with what transpired since.

Q. I understand that. But you're taking the position that it is your money that you will use yourself?

A. Yes. I'm not saying I'm going to use it. Perhaps I'll put it in there and save it until Joe gets out and needs something. But I don't know what I'll use it for, but I think it is ours.

Q. But you're –

A. A lot of that is ours from birthdays and things like that.

Q. Your testimony was that last summer you gave a similar account to the sister Jodi when she was traveling?

A. Um-hum.

Q. And it would be your intention to do something similar with this money?

[47] A. I don't quite understand what you are saying.

THE COURT: Let me ask you this: Would you say, Mrs. Libretti, that it was an uncompleted gift? In

other words, that you and the doctor had been putting funds in there from his childhood, but that he was unaware of it and you had never given him the passbook and you never did anything with the passbook until federal officers came and then you gave it to them; is that a correct statement?

THE WITNESS: I would say yes. I'm not certain that as a little boy, when birthday money came or something that maybe we didn't all walk up to the bank and he put it in.

THE COURT: He might have been with you?

THE WITNESS: Yes. So that he felt like, you know, he was doing some banking or something. I'm sure we've all done that with our children.

THE COURT: We all have.

THE WITNESS: But what I would do with it, I can't say what I would do with it. I just feel that it has absolutely nothing to do with what this case is and I feel that we are entitled to have it back.

Q. (BY MS. WOODHOUSE) Just one question. I believe that the actual – the passbooks on both of these accounts were turned over by your husband to his [48] attorney Mike Monico as Joe, Jr.'s, property after the restraining order was entered in this case. Do you have knowledge of that? They came to us from Mr. Monico.

A. We were asked to turn over anything that had Joe, Jr.'s, name on it.

Q. Okay.

A. And that's how this came about.

Q. But both these accounts are in Joe, Jr.'s, name, right?

A. They have his name on them.

Q. Yes. As well as yours?

A. One has mine and one has my husband. And because the one that has my husband's Social Security number on it is because as a child Joe, Jr., didn't have a Social Security number –

Q. So that was the reason?

A. – is how I understand it.

Q. That was the reason for that?

A. Now I understand all children need a Social Security number as soon as they are born but –

Q. Didn't used to be that way, did it?

A. No.

Q. Now, it's a little bit difficult for me to ask you these questions but –

Your Honor, would ask the Court's permission [49] to refer to grand jury testimony that was given by Dr. Libretti concerning the transfer of the property?

THE COURT: Well, I'll take notice of it.

MS. WOODHOUSE: Okay.

Q. (BY MS. WOODHOUSE) We interviewed your husband before the grand jury and he told us that he had

received a deed for that Lincoln County property in the mail and prior to receiving the deed, he had no knowledge or information concerning why he would be receiving this deed. It was just something he received. Are you aware of that?

A. Yes, I am.

Q. And that he paid absolutely nothing for this property. He did not say, "I'll buy the property from you for $1,000," or – there was no negotiation or sale.

A. No. We didn't buy it. But Joe, Jr., had wanted us to have it to pay back some of the money that my husband had put out for Mr. Truman.

Q. But the money –

A. I mean, it was – this was his only way that he had to pay back his father.

Q. That's your understanding now?

A. No. This is how I understood when it came.

Q. Oh, there was a letter with it?

A. No. Actually there was – in the beginning, [50] Mrs. Porter and I had a lot of telephone calls, understandably, because this was pretty upsetting. And one day she told me that Joe wanted us to have the land to pay – to help pay for some of this money that we had put out for Mr. Truman. And I said, "Well, you don't – he doesn't have to do that."

And she said, "He wants to do that." And then the letter came, or the deed came. So it was his only way that he knew of to repay his father.

Joe has always been very independent and never asked us for anything. He's always paid his debts, I'm certain, and this was his way of giving his father something. He had nothing else.

And we had no idea that, as you are inferring, it was bought with drug money.

Q. Your husband testified in the grand jury that he did not expect to be repaid for the attorney's fees and had made no arrangements with Joe, Jr., to be paid for the attorney's fees, and this was on January 28, 1992.

A. That's true. We didn't ask for anything in return.

Q. And Claudia Porter testified that she didn't know why the land was being transferred when she testified on January 29th of '92. She had no recollection of why that transfer had occurred. All she knew was that it [51] had been done and she sent the paperwork on to you.

A. Well, I can't say for that.

Q. That's not what she told you, apparently.

A. It was my understanding the way I told you.

MS. WOODHOUSE: A moment, Your Honor?

THE COURT: Surely.

Q. (BY MS. WOODHOUSE) Mrs. Libretti, if you may be refreshed a little bit, I believe that in the initial phases in January of 1991, right after your son was arrested, Mr. George Zunker represented him and it – and Mr. Truman was not even hired until his entry of appearance is in April of 1992.

A. Okay.

Q. Are you aware of that?

A. I believe we sent a retainer to Mr. Zunker also. You know – I'm sorry – you are right about Mr. Truman. This is Mr. Zunker that we are speaking of, because it was Mr. Zunker. We also sent money to Mr. Zunker.

Q. Prior to this, the transfer?

THE COURT: It was Zunker, and not Mr. Truman?

THE WITNESS: Yes.

THE COURT: I see.

THE WITNESS: I'm sorry. I don't – Mr. Truman was so long, I keep thinking Mr. Truman. It was Mr. – it was Mr. Zunker.

[52] MS. WOODHOUSE: Excuse me a moment, Your Honor.

THE COURT: Surely.

MS. WOODHOUSE: No further questions, Your Honor.

THE WITNESS: Excuse me. It was March that Mr. Truman came on the scene. So when I referred to an attorney, I meant Mr. Zunker. I think someone mentioned Mr. Truman's name and that's why Mr. Truman.

THE COURT: Okay. Thank you, Mrs. Libretti. Now Mr. O'Donnell has some questions.

MR. O'DONNELL: Thank you, Your Honor.

CROSS-EXAMINATION

Q. (BY MR. O'DONNELL) Mrs. Libretti?

A. Yes.

Q. The government was kind enough to provide me copies out of those passbook accounts, and I wonder if you and I could look at those for just a moment.

A. Yes.

Q. Let's start at the account at First Federal Savings on the – or at least it used to be known as First Federal Savings – can you look at these copies and understand how the bank account works? Can you determine from looking which columns are savings, withdrawals, which are savings deposits, et cetera?

A. Um-hum.

[53] Q. And I'll need you to answer audibly for the court reporter, please.

A. Yes.

Q. Thank you. Would you tell His Honor when the last deposit was to this savings account? As I looked at it, I thought it was in 1975. Would you tell me if you see anything different? And be careful not to confuse what might be interest accrual deposits as opposed to an independent deposit.

A. This is a savings added. Okay.

MS. WOODHOUSE: Here is the passbook.

THE COURT: Thank you, Ms. Woodhouse.

Q. (BY MR. O'DONNELL) Do you see savings to be added to the savings? Do you see a deposit?

A. July 7, 1975.

Q. Do you see any other added entries in that account after 1975?

A. No. No, I don't.

Q. It just has multiple pages?

A. No, I don't.

Q. And the name on this First Federal account, the account is titled in whose names?

A. Joseph Victor Libretti, Jr., and Beverly Libretti and Joseph E. Libretti.

Q. Beverly and Joseph E. Libretti are you and your [54] husband?

A. That's correct.

MR. O'DONNELL: Your Honor, I realize the copy is not the best evidence as you have the best evidence in front of you.

THE COURT: Yes. I have the original in my hand right now. Mrs. Woodhouse handed it to me.

MR. O'DONNELL: I would enter into the record the copy.

THE COURT: Yes. I think the copy should be received rather than the original. How is it marked?

MR. O'DONNELL: It is not marked.

THE COURT: Let's mark it Libretti Exhibit A.

(Defendant's Exhibit A

marked for identification.)

Q. (BY MR. O'DONNELL) And so we have a clear record for a later time, Mrs. Libretti, what the clerk of court has been kind enough to mark as Defendant's Exhibit A, when you were referring a few moments ago to no deposits since 1975, were you referring to this document, Exhibit A?

A. Yes.

(Defendant's Exhibit B

marked for identification.)

Q. (BY MR. O'DONNELL) Okay. Thank you. Now, let's [55] mark another document and we will do this in a better order. I will now hand you what I have marked as Defendant's Exhibit B and ask you if you know what this is.

A. Yes.

Q. What is it?

A. It's a savings account at – from Joe, Jr.

Q. Is this the LaSalle account you referred to earlier?

A. Northwest Federal Savings account book.

Q. And perhaps –

A. It has a different name now.

Q. Is this that other account that you referred to in your testimony?

A. Yes.

THE COURT: This is called Northwest Savings & Loan Association, but is that the same?

THE WITNESS: It has another name now. I think it's LaSalle-Talman.

THE COURT: LaSalle-Talman is now the name?

THE WITNESS: I think so.

THE COURT: Okay.

THE WITNESS: I told you I don't do the banking.

Q. (BY MR. O'DONNELL) You're doing fine, Mrs. Libretti. Would you do the same thing for us with [56] this account as you did with Exhibit A and tell us whe the last deposit is shown on the records to be made into the account as best you can determine?

A. As best I can determine – this is the deposit?

Q. Let me make a representation to you here that the far right-hand column has a heading that says "Balance," and it appears to me the balance column has slid a little to the left over time. Can you tell me if that is correct with your understanding?

A. Yes. That's how it looks.

Q. Understanding that the columns may not be completely aligned, can you tell when the last deposit was to this account that was not accrued interest?

A. December 28th, 1981.

Q. All right.

A. Is that –

Q. I am asking you is that what appears to you?

A. That's what it appears to me.

MR. O'DONNELL: All right. Again, Your Honor, we offer Exhibit B.

THE COURT: Exhibit B is received.

(Defendant's Exhibit B

received in evidence.)

MR. O'DONNELL: Thank you, Mrs. Libretti. Oh, I forgot one question.

[57] Q. (BY MR. O'DONNELL) This account is in whose names?

A. It's in Joseph B. [sic] Libretti, Jr., and Joseph E. Libretti.

Q. And Joseph E. Libretti is your husband? And you are here on his behalf today?

A. Yes. I am here on his behalf.

MR. O'DONNELL: Mrs. Libretti, thank you very much. That is all I have, Your Honor.

THE COURT: Miss Woodhouse?

RECROSS-EXAMINATION

Q. (BY MS. WOODHOUSE) In each of these accounts they are opened in the names as joint tenants with right of survivorship. Did you read that on the first page where you sign on the account that's just Joe, Jr., and Joe, Sr., which is now the Talman Home account? It says held as joint tenants with right of survivorship; is that correct?

A. That's what it says, yes.

Q. And on the other account – do you have that? – it's in all three of your names and also printed, though it says as joint tenants with right of survivorship?

A. Yes, it does.

Q. Now, the transfer of the Lincoln County property is only to your husband; isn't that correct? It's not to both of you?

[58] A. As far as I know it's to my husband, yes.

MS. WOODHOUSE: Thank you. Nothing further, Your Honor.

MR. O'DONNELL: That's all I have, Your Honor.

THE COURT: All right. Thank you, Mrs. Libretti. Did you have anything else you wanted to add on behalf of yourself and the doctor as a claimant?

THE WITNESS: No. Unless Joe has – junior – has something.

THE COURT: And we'll hear from him later.

THE WITNESS: Okay.

THE COURT: Okay. Thanks very much. You may step down.

Now, are there any other third party claimants in the courtroom?

Apparently not. All right. At this time I'll be glad to hear any rebuttal that you wish to present, Miss Woodhouse, with regard to these claims.

MS. WOODHOUSE: At this time, Your Honor, I'll call Special Agent Tony Young.

THE COURT: Mr. Young you will come forward.

(Witness sworn.)

TONY YOUNG,

called for examination by the Government, being first duly sworn under oath, testified as follows:

[59] DIRECT EXAMINATION

Q. (BY MS. WOODHOUSE) Please state your name.

A. Tony Young.

Q. Mr. Young, you're employed by the Division of Criminal Investigation for the Wyoming Attorney General?

A. That's correct.

Q. And as part of your employment, you were engaged in a drug task force for major crimes in Wyoming?

A. That is correct.

Q. And that was a joint federal investigation?

A. Yes.

Q. During the course of your employment, you were involved in the Joseph Libretti investigation over a long period of time, weren't you?

A. Even through today, yes.

Q. Okay. Can you tell the Court basically what you learned about the income and quantities of drugs that were distributed – the income that Mr. Libretti received during the course of his drug distribution?

A. Well, for many different sources the total amounts of cash are hard to determine. They are well in excess of one million dollars from the time that he entered college in Denver – in the Denver area – from 1981 through the time of his arrest and even after that time, the liquidating of his assets.

[60] Q. Is that profit?

A. That would be profit, yes.

Q. Can you outline for the Court some of the significant cash transactions involved by the defendant and compare that to how much he was making at legitimate jobs at the time?

A. Well, I've reviewed many of the bank records from his banks that he had in the Lakewood, Colorado, Denver metropolitan area from the time that he moved there to the time that he, in fact, is claiming he had accounts and moved up to Wyoming.

Now, the first significant purchase that I recall the defendant having made was during his college years or just after he graduated from college in the fall of 1985. He purchased a home for just under $200,000 in Lakewood. They put down – he and his wife-to-be at that time put down about $104,000 cash, of which Mr. Libretti provided 74 to $75,000. Miss Cambruzzi – at that time that was her name – she placed $30,000. During this time I noted that his reported income in 1985 was $12,000.

Q. And do you know where he was working at the time?

A. As I recall, that was – I believe it was Red Lobster Restaurant. In 1986, just after the turn of the year, I believe it was in February, he purchased a GNMA [61] certificate, as I recall, for about $9,000 cash, again, reviewed from all the bank records that we have. Many large cash purchases in 1986. He obtained a gun license and started a business known as Lakewood Firearms Supply.

Q. Are you aware of a cash – a deposit made and a purchase of a GNMA certificate in the summer of 1986?

A. Yes. Although the amount evades me, I think that was a $6,000 – was that the $6,000 ones?

Q. Our records show $20,000.

A. $20,000. I don't recall that specific one.

Q. And are you aware of the amount that he reported as income for 1986?

A. 1986 – I'd have to look at those notes again. I think it was $11,000.

Q. That was the year he filed jointly with his wife $47,000?

A. That was 1986 or 1987.

Q. '86. I have some notes we prepared yesterday that might assist you.

A. Yes. That's 1986 was the year he filed jointly with his spouse. Total income reported there between the two of them was $47,200.

Q. Can you go on with other significant cash purchases made by the defendant?

[62] A. Other significant cash amounts that the defendant had during that time, for example, in 1987, while attending a family reunion in the Chicago area, he placed $48,000 cash into a safe-deposit box with his little brother.

Q. That brother's name was?

A. William Libretti. In 1987 he began purchasing the firearms. I don't recall the exact amounts of the money for those firearms, but this is when he obtained his machine gun license, as I recall, was in 1987.

Q. And there were tens of thousands of dollars involved in that; isn't that correct?

A. Well, our estimates of all the machine guns and everything that would have been seized, we know from the records that we have subpoenaed and reviewed from the purchasers, he spent over a quarter million dollars on firearms. The current appraisal of that firearm collection was at about 192,000.

Q. Now, during 1987, what – are you aware of what he reported as income to the IRS?

A. In 1987 he reported $11,000 income. It's also significant to note that during this time he was divorced from his wife and paid her a settlement on the house. Now he kept the house and he paid her an additional cash settlement of $45,000. He did that with [63] a cashier's check totaling roughly $9,000 each he paid to her in cash. This is exclusive of the 48,000 that he placed in the safe-deposit box in Chicago.

Q. And you're also aware of significant drug distribution activities during these time periods?

A. Yes. Also in 1987 Ray Rivera had the misfortune of breaking into his storage locker and stealing from him $10,000. He also, as we heard from Miss Porter in our interviews, had the money or had cash stacked into a briefcase. Mr. Rivera estimated that amount to be at 150,000.

Q. When you say – who do you mean, the defendant?

A. Mr. Rivera stated that.

Q. About the defendant?

A. That's correct. And the defendant did confirm, in fact, to the investigators that $10,000 had been taken from him in that storage locker. That's what I recall for 1987.

Q. Do you remember significant cash purchases in 1988?

A. Could you spin the chart to me so I can look at that? I prepared that so I – in the year of 1987 his

reported income was $11,000. Then we go into 1988 when he purchased $19,000 worth of weapons in January. He also – I'm sorry, that's 1989. In 1989 he purchased $70,000 worth of weapons.

[64] Q. In 1989?

A. That's correct. 1988, rather.

THE COURT: How much was it in '88?

A. $70,000. And 1988 he reported his income at $16,000.

Q. (BY MS. WOODHOUSE) And significant purchases or cash observed in 1989?

A. Yes. In 1989 that's when he bought the bonds from the RFA financial. He paid $9,000 cash for those. When I say cash, I mean these were done with cashier's checks, money that was cash taken into the banks that was converted into cashier's checks. It was also in 1989 that the defendant instructed his little brother William to remove cash from the safety-deposit box that they had opened in 1987.

Q. With the $48,000 in it?

A. That's correct.

Q. He had his little brother send him two different checks, one for $10,000 and another one for $11,000. So he received $21,000 from his little brother there in 1989? And you recall that that was the summer of 1989?

A. That's correct. July, in fact.

Q. And that was just prior to some significant purchase of the defendant –

A. There –

[65] Q. – of property?

A. There was in July of 1989. He received that money in August of 1989, he paid $16,800 cash for a brand-new Ford pickup from Rosa Novak Ford.

Q. Okay. Any other significant purchases he made?

A. Also at this time, from June of 1989, the defendant had taken a job. He had had – as we understand his employment history, he had worked for Red Lobster. And then he worked for a short time at King Sooper's store. His total net pay at Red Lobster for the time he was employed there was $11,000. And then he worked for King Sooper's for a short period of time. And then he worked for – recall it was Tenaco retail sales. It's a gas station, quick stop gas station mini mart type arrangement there in Denver. I don't have any reported – no known solid income or business that he was working at in 1988. In 1989 he took employment with General Chemical in Green River, Wyoming, on a part-time basis.

Q. When? In 1989?

A. That was in June of '89. And he worked from June of '89 until, I believe it was September or October of '89 when he was hired on full-time as an accountant.

THE COURT: Then he only worked from June to October?

[66] THE WITNESS: June to October of '89 – September of '89, at which time he was then hired full-time as an accountant.

THE COURT: Oh, I see.

THE WITNESS: It's my understanding that summertime was a probationary or intern type employment.

THE COURT: It was a part-time as an accountant.

THE WITNESS: Yes. During that same time. That's when he purchased the mobile home; again, paid cash for that in Green River.

Q. (BY MS. WOODHOUSE) At a value of what?

A. $6,000. His 1989 income reported was $26,400.

Q. And when was that filed, if you know. Was it subsequent to your investigation?

A. Not in 1989. The 1990 form was filed subsequent to our investigation.

Q. Okay.

A. No. Perhaps both of them were, now that I think of about it. 1989 and '90 were filed after he became aware of our investigation again.

Q. In 1991?

A. Right. Now in 1989, in the fall of 1989, he met Claudia Porter and began a relationship with her. From the time that he came to Rock Springs or Green River [67] rather, and stayed there until his arrest, June of '89, through December of '91, that's when he made these 57 airline flights between Rock Springs and Denver. In fact, he flew almost every weekend down there and many weekends he drove as well.

Now, my interviews with many of the codefendants, many of the codefendants stated that he would come down to handle all the drug sales on the weekend. And that's when the procurement of the drugs would take place from his suppliers. He would pay for them.

During 1989, and 1990, he formed an association or relationship with Richard Sabell and Brian Urso. From the two of these individuals, he purchased no less than 24 kilograms of cocaine from them. Now, oftentimes these purchases occurred during the week and the defendant Mr. Libretti was in Wyoming, so the payments had to be effected from cash stores that he had kept in his safe. The defendants told me that on more than three occasions that they had made these payments and perhaps as many as six, they had opened the large safes that Mr. Libretti kept his cash in and would pay sums of 60 to $80,000 for two kilograms of cocaine, and in the safes they saw as much as $180,000 in cash stored in the safes.

[68] The reason that he, the defendant, the codefendants told me that he was now keeping money in his safe at home is because he had been burglarized when he stored it at his storage lockers. And he had lost it. Of course, that corroborated Mr. Rivera's testimony that he had taken the $10,000 out of the storage locker.

MR. O'DONNELL: Excuse me, Agent Young.

Your Honor, for one thing, I am having a difficult time objecting, because Mr. Young is narrating. Also, I thought he was called as a rebuttal witness to third party claims, and I have yet to – I object to the entire line of questioning.

THE COURT: Well, it's, I suppose, foundation testimony from that standpoint, but you are proceeding by narrative, so do it by question and answer so Mr. O'Donnell can object.

MS. WOODHOUSE: Thank you, Your Honor. I'm not sure where we were.

THE COURT: We were talking about the 180,000 in the safe at home.

MS. WOODHOUSE: Okay. Thank you, Your Honor.

Q. (BY MS. WOODHOUSE) You indicated that certain of the codefendants had seen that sum of money in the savings and it was being kept there because Mr. Libretti no longer felt safe keeping it in storage lockers. Are [69] you aware of other cash sums of money kept by Mr. Libretti?

A. Yes.

Q. You may – you don't have to stop there, you may proceed and tell us about those sums.

A. Well, large sums of cash money were witnessed by Claudia Porter. Claudia Porter was the one who told me that she had seen him empty this Marlboro bag onto the bed with huge sums of cash in which – now she said that she didn't know how much money it was, but that Joe had told her it was $100,000 cash.

Q. Can you tell us when this happened?

A. This was in the fall of 1990. It was after her trip that she and Joe had taken to the Portland, Oregon, area.

She recalled that trip in the latter part of August and early part of September, 1990.

She and Joe flew to Portland, Oregon. She was in a Narcotics Anonymous meeting. She said that Joe took a briefcase – her words – filled with cash; that they had a disagreement over why he had taken so much cash. She was suspicious of his activities.

I need to point out that Claudia Porter has been interviewed and I've talked to her many, many times since late 1991 and through 1992. I would not characterize her as being a helpful witness.

[70] MR. O'DONNELL: Well, Your, Honor I object. That's completely improper.

THE COURT: Sustained. You can't really comment on the testimony of other witnesses, Mr. Young.

THE WITNESS: I'm sorry.

Q. (BY MS. WOODHOUSE) Just tell us what you know from her interviews.

A. I knew from interviews with her, from one subsequent interview, as the interviews followed each other, I learned that she had not told us the complete truth from the prior interviews. And as each and every interview went down the road, I learned more and more about her activities and her association with Joe Libretti.

Q. Tell us what you did learn.

A. I learned that she – through her, she had attempted to break into the locker at the General Chemical plant; that she was instructed to dress like a man, put

on a false moustache, wear a hard hat, carry a lunch pail, go in after dark, sneak past the guard gate. She was armed with the combination of a particular locker number.

Now this made sense to us because we knew Joe Libretti had the locker there. We were mistakenly – in December of 1991, we searched only one of two lockers and we did not find that out until he – we didn't find out that he had two lockers until much later; that she [71] had attempted to go into the locker area. She tried the combination of a few locks, she couldn't get in. Her intent, given her – she intended to remove cash from the locker, her statements.

Joe had told her that there would be cash in the locker and that she should remove it. She said that she never did remove it. Then later she confirmed in another interview that she had cash, and in fact, the cash had been concealed and missed in several searches while we had been at her house.

The cash in the paint can. We had had several interviews with her prior to her revealing to us the principles of the cash in the paint can. She told the story of them not having enough money to go on a ski trip to Alta. When she didn't have the cash and Joe didn't have the cash, Joe went down – this was in the Thanksgiving of 1991 as I recall. They didn't have enough cash. He went downstairs, came back up with a set of rubber gloves on with paint dripping off of them. This precipitated another argument that they had about his having told her that he was completely removed from the drug business and now she saw evidence that he wasn't.

Q. Backing up a little more, there was an incident at Hardee's in Loveland where there was a transfer of drugs [72] between Mr. Schlosser and the defendant. And you were told by Miss Porter of her impressions of that incident. Can you tell us what she was told about that as well?

THE COURT: Excuse me. What she was told or what she told Agent Young? I didn't –

MS. WOODHOUSE: Actually, I said what she was told.

THE COURT: By whom?

MS. WOODHOUSE: By the defendant.

A. She said that she was with the defendant when they arrived at the Hardee's Restaurant. In fact, they had stopped there on many occasions on their trips down to Denver and they would eat there. They met with Dave Schlosser. Mr. Libretti and Dave Schlosser went into the restaurant and conducted what she characterized was a transaction. She did not say that she saw the actual hand off. She didn't see exchange for drugs and money, but she knew that something was up. She confronted Libretti about it. He told her – this quoting Miss Porter – his pat answer, "It's best if you don't know."

The discussion – she wasn't satisfied with that particular part of that answer on this occasion, and that at that time, Joe promised her that this was the last time he would do it. He then went on into – they then went on into Denver. That's the detail at [73] Hardee's. Of course, I have interviewed Dave Schlosser and he confirmed that that exactly happened.

Q. On that date?

A. Yes.

Q. The phrase of the defendant telling Miss Porter, "It's best if you don't know," had been used numerous times during their relationship; isn't that true?

A. That's what she told me, yes.

Q. And basically, that covered his drug activities that she was knowledgeable of, even if not directly told?

A. And she told me that she wanted to believe – she was in love with him, and she wanted to believe that he was not involved in drug trafficking.

Now, by April of 1992 when we're still conversing and she's turning over keys, safe-deposit box keys to the government, she tells a story of him taping the money to his body. She found the money.

Q. And that was in December of 1990?

A. December of 1990. She's relating many incidents. She looks back and characterizes to me that she was – she was very foolish to have not known immediately that he was involved in narcotics.

She herself had been – had had a problem with it in her past. But that she wanted so much to believe that it wasn't true, that she convinced herself that [74] this was just the residual profits coming in from his past dealings. She knew that wasn't the case.

I believe it was March or April 1st or March 31, somewhere in that area, when we recovered the one and a half kilograms of cocaine that was buried on his property,

the Star Valley Ranch property in Star Valley next to her parent's property.

Q. And that was located directly on his property?

A. That's correct. No. I'm sorry. That was not actually on the property. That was off his property. I believe it was about 30 or 40 feet from his lot.

Q. From his lot line?

A. That's correct.

Q. And these are undeveloped properties?

A. That's correct, yes.

Q. Now, can you tell us about the purchase of the Lincoln County property by the defendant?

A. I can tell you that my interviews with Claudia Porter, her parents, Eldon and Barbara Staley own a lot with a cabin on it. In fact, I've been to that location, in Star Valley. That they would sometimes go up and spend the weekend with Claudia's parents and the Staleys; that he became interested in purchasing a lot, and he did so in August of 1990. And he purchased that lot from Chester Byrd for approximately $20,000.

[75] Now that transaction, that money I traced through the bank accounts was from cash deposits placed into banks in the Denver metropolitan area where cashier's checks were then purchased. Those cashier's checks were turned around and deposited into another bank where they were turned around into another cashier's check that was transferred into the Wyochem General Chemical account in Green River, Wyoming, at which

time they issued a cashier's check to the Wyoming Land and Title that was the actual closing agent. And then the funds, of course, were provided to Byrd, the seller, and then the title to him as the purchaser.

Q. And what was the amount of that property?

A. Approximately $20,000.

Q. And is the value of the property approximately the same at this date?

A. I believe it is, yes. It perhaps has appreciated some. I'm not certain.

THE COURT: I think, Miss Woodhouse, we ought to take a rest and give our reporter a break here at this point. We will stand in recess 10 minutes.

MS. WOODHOUSE: Thank you, Your Honor.

(Proceedings recessed 10:42 a.m., reconvened 10:58 a.m.)

THE COURT: Please continue, Mrs. Woodhouse.

[76] MS. WOODHOUSE: Thank you, Your Honor.

Q. (BY MS. WOODHOUSE) Special Agent Young, when in 1990 – I believe we did not go through the significant cash expenditures. Could you please describe those for the Court?

A. Well, other than the land purchase I described in August of 1990, in April of 1990 Joe Libretti purchased a brand new 1990 Toyota vehicle from Burt Toyota in

Denver, Colorado. And he paid roughly 19,500 cash for that or wrote a check for it.

In May of that same year, just a month following, he purchased another pickup truck for $14,800 cash. Then the land was in August of 1990 for 20,000. And during which time he's also purchasing five firearms. I don't know the exact amount of firearm purchases he had during 1990. Maybe that's on there. Yes. He purchases $25,000 worth of firearms in 1990 as well.

Q. And you had conversations with Claudia Porter in which she indicated that she had seen large quantities of cash?

A. Correct.

Q. And can you tell us what they told you about that money?

A. Well, initially, she said that she assumed that it [77] was – she knew that he had a past and she felt, or wanted to believe, that he had left the drug trafficking behind him. But as time went on and the arguments grew on, she admitted to me that he had to have – in fact, she stated to me, "I know he was involved in it right up to the time he was arrested." Certainly, because of the activities that he had requested of her.

She also knew that he was still selling cocaine to Emily Coolidge, another one of his friends, because they would talk in codes on the telephone, and that Emily Coolidge was receiving packages of champagne from Joe Libretti. She had arguments with Joe Libretti – I am sorry. Let me back up. The champagne –

Q. Champagne sounds good.

A. Champagne was – I am sorry – I should have explained that champagne was Emily Coolidge's code word for shipping cocaine.

Q. How did Claudia know this had been established as a code word?

A. Because she saw it and read it in a letter. She figured this out herself and confronted Joe Libretti with it and he did not deny it.

Q. And those transactions were going on in 1990?

A. Late 1990 as well.

Q. Did she also tell you about the money that was taken [78] from Portland and that it was kept in a safe there in the hotel?

She told me that the cash had been secreted into a briefcase. She had discussions with Joe about that, why he needed to take so much cash. He tried his pat answer several times, "It's best if you don't know." She knew this, that they stayed at the downtown Portland Hilltop Hotel; that he had to utilize a safe, one of the hotel safes, to secrete the case for security purposes so the money wouldn't get stolen.

Q. Did he return with that cash?

A. She did not know, but she believed he did.

Q. Did – he did come back with the cash?

A. Some of it, yes.

Q. And did she give you any better indication about the approximate value or quantity of money that was involved there?

A. When she initially had talked about the cash in the briefcase, she said it was $100,000. Although she admitted that that was from his statements, not herself. She did not know those amounts.

Q. Now, following that trip which was in September of '90, and also following that exchange that occurred between Schlosser at Hardee's in Loveland and the defendant, then the – then Miss Porter saw the Marlboro [79] bag that was filled with cash?

A. Sometime between there and the trip that Joe Libretti took in early or mid-December where he'd taped the money to – attempted to tape the money to his body. She saw him take the red Marlboro bag, the red bag with Marlboro written on it, and pour that money out onto the bed, and she said it was large amounts of cash, bundles of cash, and he again told her that that was about $100,000.

Q. And at that time, what was her knowledge of his involvement in drug distribution?

A. She characterized her knowledge as believing that he had gotten out of the business and that this was just residual income.

Q. But it was drug income?

A. That's correct.

Q. Then in December there was the time when he was trying to – attempting to tape this money to his body?

A. Correct.

Q. And did she give you an indication of what quantity of money was involved in that episode?

A. No. I don't recall if she did give an amount.

Q. It was numerous bundles of cash?

A. Numerous bundles of cash wrapped up in newspaper.

Q. Then in 1991 the investigation began. Can you tell [80] the Court when that started?

A. Well, the investigation was initialized in the Lakewood, Colorado, area in late 1990 and culminated with search warrants on January 9 of 1991.

Q. Now, following search warrants starting in January of 1991, what efforts are you aware of that the defendant engaged in to conceal drug proceeds from the United States?

A. Well, his arrest was on December 4th and he was detained five days of that time.

Q. I'm talking about during the year of 1991, prior to his arrest.

A. Right. Just after his arrest – oh, you mean what he had done prior to his arrest to conceal the property?

Q. Safe-deposit boxes and another –

A. In fact, he rented a series of nine different safety deposit boxes. Overall from the time the conspiracy alleged in the initial indictment, he had, I believe it was, 27 – I will take a conservative number of 23 safe-deposit boxes in and around the Denver metro area, and had nine of them open at one time, as I recall.

Now, did – the codefendants said on many occasions when they were to purchase cocaine from him, that he

would take them to particular banks. One in particular was the Bank Western at Miller and Colfax, [81] the same one where he banked. Right across the street was another one, First Bank. Just up the street to the east was Wadsworth and Colfax was the Jefferson Bank and Trust.

Of course, I reviewed those entry records and he had been in and out of those safe-deposit boxes as many as well, sometimes three times on one Saturday. And from the life of one safe-deposit box, he was in there – he had it for a year and he was in and out of it, like, 39 times.

Q. Now, concerning money in 1991, that he concealed in a safety-deposit box, are you aware specifically of a safe-deposit box in Mount Prospect, Illinois?

A. I am.

Q. What are you aware of regarding that box?

A. I know that that box was opened on April 27th of 19 –

THE COURT: Now, which box was this?

THE WITNESS: This was box – this was at – at Country Side Bank at Mount Prospect, Illinois.

Now, we've recovered some records of airline flights detailing that Joe Libretti had flown from Green River, Rock Springs to Denver to Chicago on April 26th. It was a Friday.

THE COURT: 4-26-91?

[82] THE WITNESS: That's correct. On April 27th of '91, Saturday morning, he opened and entered a

safe-deposit box of Country Side Bank. And on the 28th of 1991, the day following that, he flew back to Wyoming.

The box, I searched in March or April. I believe it was April. Yes, it was April of 1992, and we were made aware of the box because Claudia Porter had given us the renewal slip. The annual rent on the box was due and that notice of rent due had been sent to Claudia Porter. Well, actually, it had been sent to Joe Libretti at Claudia Porter's address. She gave that to us. That is why we became aware of that box. We did, however, know he had made that flight out there.

Q. Were you also aware of some boxes in the Denver area which were apparently entered for the final time in July of 1991?

A. Yes. July of 1991 he had safe-deposit boxes at the First National Bank of Lakewood and that box was closed. He also had a box in – that may have been August. But in July of '91, July or August, he entered for the last time the bank safe-deposit box in Springville, Utah. That was the last time that one had been in.

Q. And Claudia Porter related to you that she'd accompanied him on that trip to open – at least to open [83] the account in Springville, Utah –

A. Yes.

Q. – or excuse me, the safe-deposit box?

A. That's correct. And that's the time he had the red Marlboro bag, as I recall, or he had taken that bag or the briefcase with him. And that's why she assumed that safe-deposit box was being used to conceal cash.

Q. But that box was entered for the final time in August or July of 1991, and you did search that box and found it to contain nothing?

A. It was empty, yes.

Q. Are there other activities during 1991 prior to the defendant's arrest which indicated a concealment of drug proceeds or transfer of drug proceeds?

A. Well, yes. We searched the safe-deposit box at the Country Side Bank and we found $28,060 wrapped in newspaper much the same way that Claudia Porter had described to us from December of '90, his trip to visit his brother in Michigan. That money was 28,000 – was wrapped in newspapers from the Lakewood, Colorado, area. The papers were dated January of 1991.

Q. Now, are you also aware of the defendant's gaining entrance into a safe-deposit box he held in Colorado after the search warrant was executed on January 9 of 1992?

[84] A. Yes. On January 9th, he flew, stating that he had an emergency; that there had been a death in his family.

Q. Who did he tell that to?

A. He told that to people at General Chemical that he worked at, that he had a death in the family. As I recall, this was a Wednesday. He hopped on a flight, flew directly to Denver, bank employees who I interviewed said that.

Q. Which bank is this?

A. This is at Bank Western at Miller and Colfax. They were – and I will have to back up and tell you a little bit about this in 1990. They knew Joe Libretti rather well at this time. In fact, in February of 1990, they had reported Joe Libretti's suspicious cash deposits to the IRS. They reported them to their headquarters in downtown Denver and then the headquarter's officers was tracking Mr. Libretti's cash deposits into his Bank Western account.

They would note that on weekends he would bring anywhere from two to $5,000 cash in. Nearly every weekend during this time period, this suspected time period, he would make cash deposits at the branch in what's known as the Westland Branch, the one at Miller and Colfax. In the same day in the afternoon, there would be another cash deposit at the Southwest [85] University Mall Branch. There were deposits over in the Aurora side, and the individual from Bank Western whom I interviewed showed me these records, and that's how they were tracking his activity. They thought that highly suspicious.

The tellers that we interviewed said he would come in and say he had been selling guns and he had a gun business and he led them to believe he was depositing these sums into those accounts. In fact, prior to this time, they had filled out what are known as cash transaction records on him for deposits exceeding $10,000.

One of the conversations that the teller had with the defendant at that time was Joe had asked her, "What are you doing?"

She said, "I have to fill out this form in any deposits over $10,000, and you have to identify yourself."

He fictitiously wrote on there, he wrote he worked at King Sooper sales, and he was not employed there at the time and the money went in. But from that time forward, she instructed him – these amounts are from $10,000, or otherwise suspicious – so from that time forward Joe Libretti did not make any deposits of $10,000, he made them for much less. But they were so [86] frequent, they began to file the cash transaction records in any event, because they felt they were suspicious.

Q. So on the date the safe-deposit box was opened on January 9, '91, did they take special note of that?

A. They did. They noticed that he arrived by cab. They said he was in a hurry. He came in, gave them authorization to enter the box, then he ran back outside of the bank and he got in the cab and he was driving around the block. He showed back up in about five minutes.

The bank teller's words were, "It looked like he thought he was being followed and he was trying to see if he was being followed. Then he came back into the bank." The locksmith arrived, drilled the box. The locksmith that I interviewed said he knew there was something in the box. By removing it, he felt it had weight in it, but he did not open it or see what it was. Joe Libretti closed out the box, took the contents from it. The box was empty when they left.

Q. Now, describe for the Court the activities that were engaged in by Ms. Porter following the arrest of Joe

Libretti in December of '91 with regard to his property and money.

A. Initially, the Wyochem Federal Credit Union [87] accounts, she received a power of attorney, first off so she could handle his financial affairs. She was instructed to close out the accounts from the Wyochem Federal Credit Union and transfer those monies into an account that didn't have his name on it. And that's when she told us she was putting it into their joint account and wanted to keep that account, but wanted just to have his name removed from it. The bank refused to do that. They said, "We can't just remove that. What you should do is just open up another account in your name." And so that's what she did. She opened up another account in her name only, and then deposited that cash into it.

Q. Now, stopping there, have you had a chance to analyze the records from that General Chem – Wyochem Credit Union account?

A. Yes, I have.

Q. And the deposits in that account came from what sources?

A. They came from checks, cash, and transfers.

Q. Can you tell us the amount of the deposits that occurred during the year of 1990 or '91?

A. In 1990 they were $75,000 cash funneled into that account or $75,000, of which approximately 28,000 was in cash. I think another 22,000 was in transfers and the [88] rest were by deposits of checks.

Q. And some of these checks were?

THE COURT: Are these checks for salary?

THE WITNESS: No. I didn't get each and every deposit item, but they were consistent with checks for salary because they came twice a month and they were for the same or reoccurring type amounts. I believe that's what they were, Judge.

Q. (BY MS. WOODHOUSE) Okay. And continue on with the instructions and the distribution of that account.

A. She was instructed to close that account out and then put it into her – get the account out of his name. Get the money away from him.

Now, initially, she didn't tell me this, but she did say later, as did Dee Smith tell me, that these monies were being transferred because Joe said they were going to take it from him. She was also instructed to get – with the power of attorney, to get a quit claim deed on the property.

Q. And that's the Lincoln County property?

A. On the Star Valley Ranch property. She was instructed and she received in the mail from the law office of Zunker and Sullivan a quit claim deed notarized and signed by Joe. She was to file that using her power of attorney and then transfer that property to [89] Joe, Sr.

Q. Or send the deed to Joe, Sr.?

A. Send the deed to him. She did. And she said she did as instructed. She was also instructed to go to the courthouse, utilizing the power of attorney again, and obtain a duplicate or replacement title.

Now in August of 1991 –

Q. Replacement title for what?

A. The trailer house. In August of 1991, we had seized the original titles of the vehicles and that trailer home, at 800 Wilderness Trail. She went in in December or January of – December of 1991.

MR. O'DONNELL: Excuse me again, Agent Young.

Your Honor, I'd like to object.

THE COURT: It is narrative.

MR. O'DONNELL: Absolutely. No foundation for what Agent Young is testifying to, no dates. If he's testifying to what he legitimately knows, what occurred and what she said –

THE COURT: Can you tell us when she told you this?

THE WITNESS: Well, my knowledge of this is a little confused because it's corroborated by my review of the record at the courthouse. But she told me this in her interviews of February or March of 1992.

[90] MR. O'DONNELL: In addition, Your Honor, to the foundation objection, this entire line of questioning is not rebuttal testimony to third party claims.

THE COURT: Oh, I think it's in rebuttal to the claim of Mr. – Dr. and Mrs. Libretti on the title to the Star Valley Ranch.

MR. O'DONNELL: May I have, so I don't waste your time, Your Honor, a continuing objection?

THE COURT: Surely. Go ahead.

Q. (BY MS. WOODHOUSE) You may continue on with your description of the information from Miss Porter.

A. Miss Porter told me that she was instructed to transfer the title from the mobile home to her name after having obtained a duplicate or lost title. She said she went to the courthouse and did that; that she signed an affidavit that the title had been lost or destroyed and then a new title was issued in the name of Joe Libretti. She then transferred that title to herself as Joe had instructed her, utilizing the power of attorney.

Q. Now, at the time that she signed this affidavit saying that it was lost or stolen, was she aware that the United States government had it and it was not in fact lost or stolen?

A. I don't know if she was aware of it at that time.

[91] THE COURT: Well, what you're telling us is that this Wyochem account was really his bank account, the only one he had at the time, and he was using this for his expenses?

THE WITNESS: Well, it was actually – the Wyochem Federal account, Your Honor, was not only his main checking account and savings account, he still had accounts open in Denver, Colorado.

THE COURT: Yeah. But this was his main account.

THE WITNESS: That's correct.

THE COURT: And you're saying that you think that the drug money was commingled with his own earnings in that account.

THE WITNESS: It had to have been, yes, sir.

THE COURT: Okay. Yes, sir. Go ahead.

MS. WOODHOUSE: Thank you, Your Honor.

Q. (BY MS. WOODHOUSE) And other – Miss Porter effected other transfers of funds and property for the defendant after he was arrested?

A. That's correct.

Q. And did she tell you her reason for affecting these transfers?

A. Eventually, she did tell me that her reason was Joe had told her that the government was going to take it [92] from him and it had to be moved out of his name. All of this stuff had to be moved from his name, which was exactly what she did.

Now, initially, when he asked her about signing the affidavit for the lost or stolen title, I am not sure she ever knew when she had it or not. Of course they would have had it on the returns, but had she read that, I don't know.

I told her we had these titles and why was she transferring these things into her name. She said it was strictly at Joe's instruction and it didn't have anything to do with gifts or having to maintain these things for him. At that time she told me it was because Joe had told her to get them out of his name.

MR. O'DONNELL: Again, Your Honor, I object. Miss Porter has filed a claim for two pieces of property. All their testimony is about a mobile home and other pieces of property. It's just not relevant.

THE COURT: It relates to what she did with respect to her power of attorney on – admittedly, there isn't a claim on the motor home, but on the Star Valley Ranch loss. So it's relevant.

Q. (BY MS. WOODHOUSE) Tell us about just exactly how it occurred that you found out about the ring that Miss Porter had been given by the defendant –

[93] A. Well –

Q. and when that happened.

A. I learned of the ring on or about August of 1991 after having conducted the search warrants at his house and storage lockers. We found the appraisal and the receipts for the ring. The appraisal was just shy of $4,000 for an – as I recall, it was a .85 carat diamond set and it was in a mount. And there was a picture of it taken in the appraisal. I questioned Claudia Porter about that.

Q. When was that?

A. This would have been in February or March of 1992. The actual date evades me now. There were many interviews there as we progressed. I asked her where the ring was and what she had done with it. She told me that she had taken the ring and she had hocked it and he had gotten money for it and spent the money.

Q. Hocked means pawned?

A. Pawned it, yes. I asked her who she pawned it to, where were they at? Let's get the pawn slips, let's back this – trace this down. And it was at that time he said she had the ring, she had lied to me; that she had the ring.

This interview took place at her restaurant. She removed the ring from her purse and gave it to me. [94] We counseled – we talked quite a bit about my belief that she was being deceptive and withholding much information. She was more forthcoming and, in fact, at this time she gave me the slip that indicated that he had – the box rent was coming due in Chicago and that she became more and more cooperative.

She stated that she knew this relationship with Joe was wrong. She wanted to remove herself from it all. She slid over all the property including the power of attorney, the titles to the mobile home. She told me that she had transferred, of course, the title – or the deed to the property had already been sent to Joe, Sr. She said she wanted nothing more to do with Joe Libretti and she hoped she was through with him.

I accepted – and I probably still to this day – that she cares very much for Joe and has a difficult time doing this.

Q. Now, with regard to the actual turning over the safe-deposit box keys, can you tell us how that occurred?

A. I asked her if she would – when I was leaving, if she had told us the entire truth about everything else. She said that there was some other things, and she said that she had some money that Joe had left at the house. I told her that I was en route back to Cheyenne at the [95] time.

I asked her to please explain that to Lieutenant Mecham, that he would show up later in the afternoon.

She subsequently turned over cash to Agent Mecham, the cash that was in the paint can that you heard testimony of earlier. But she – at this time, she still – she was in possession, however, of the three safety-deposit box keys, but she hadn't given those to us at that time either.

It wasn't until I received a call from Craig Truman's defense investigator, his criminal investigator, he called me at home in Cheyenne and said that he had interviewed Claudia Porter and Claudia had told him of some safe-deposit box keys; that he had discussed this with Mr. Truman and recollected back – let me back up a minute.

He didn't call Claudia, called me while he was there at the house, and I conversed with him after having received a call from Claudia. Said that the keys were there. I told Claudia I would send Mont over to pick up the keys. Again I was troubled that she hadn't provided this information – again, I expressed my dissatisfaction with Miss Porter over her having not revealed this to us earlier.

She said she had found the keys underneath the carpet. Once the dogs had pulled the carpet out of the [96] dog house, she found them stapled or up – on the floor of the dog house. They had been drug out. She had taken them and concealed them in the bottom of the plant. She removed the material and concealed them in the bottom of a plant and hid them until this was weighing on her, I guess, to the point she felt obligated to turn them over to us.

Q. Wasn't it until the point that she told the investigator for the defendant that she finally told you?

A. That's correct.

Q. Please outline for the Court the types of drugs that Mr. Libretti sold during the conspiracy and the amounts of money that he earned. You said earlier that it was probably at least one million dollars?

A. From the time that – well, just from the records that we seized from the first search in January of 1991, from all the accounts that he had, the amounts that we saw funneling through those accounts was over $800,000. And that was just for the time period – and that involved very few of the accounts.

Now, from 1981 to 1991 our best estimate of his drug trafficking is that he had profited in excess of a million dollars, and that was a conservative estimate after our discussion with you even recently.

[97] Q. What quantity of drugs was he selling?

A. Kilogram quantities of cocaine purchased from between 20 to $30,000, each cut, sold, distributed over the entire life of the conspiracy.

Now, not so much in the great amounts in the earlier years, but certainly as time went on.

Q. And total kilograms of cocaine that you believe –

A. Would be over 50 kilograms. We had an estimate of 76 kilograms from the codefendants. At one time we have reduced that conservatively to a 60 kilograms estimate.

Q. And a profit on each kilogram of?

A. I haven't calculated the specific kilograms.

Q. As far as narcotic profits, can you give us a summary of that?

A. The witnesses and the codefendants were not certain on the amounts of marijuana that had been sold. They saw amounts totaling what they believe to be 600 pounds at a time, and there was reportedly customers purchasing 200 pounds at a time, customers from back east.

Now, in their best estimates, he at no time would have gone through more than a ton of marijuana. And that was due in part because the product – this was in the earlier years, but the product was bulky, smelled, and that's the reason they shifted – Joe Libretti's organization shifted from marijuana to [98] cocaine was because of the bulkiness was such that it required storage lockers, it smelled, and the profits weren't as great as they were in cocaine sales.

Q. So your conservative estimate of the actual profits that the defendant earned between 1982 and 1991, is what?

A. A million dollars. In excess of a million dollars.

MS. WOODHOUSE: A moment, Your Honor?

THE COURT: Surely.

MS. WOODHOUSE: No further questions, Your Honor.

THE COURT: Cross-examination, Mr. O'Donnell?

THE COURT: Thank you, Your Honor.

CROSS-EXAMINATION

Q. (BY MR. O'DONNELL) It's true, Agent Young, that you don't claim Mr. and Mrs. Libretti, the parents of Joe Libretti, had any knowledge that anything they received was tainted with drug money?

A. Well, I believe that they had a knowledge that the land, certainly, that he had purchased now was suspect.

Q. Oh, all right. Then you tell us specifically, now, why you believe that to be true?

A. Well, I reviewed –

Q. What did Mr. or Mrs. Libretti tell you that gave you that indication?

[99] A. They told me that they had never given him any other money or any other concerns other than some, like, $2,000 for a cruise when he was married, those types of things.

Additionally, Mr. Libretti stated contrary to what I heard from Mrs. Libretti today, that he had never received the title or had any prior agreement with his son Joe that this land was for anything to do with reimbursement for attorneys' fees for his defense.

Q. What does that have to do with drug money?

A. Well –

Q. Why does that raise an inference of drug money in your mind, Agent Young?

A. No, no, no. Why does it raise a drug – if I were to receive – if my child were to sned [sic] me properties, GNMA certificates are all of a sudden appearing at my home, deeds to property are appearing at my home shortly after my son had been arrested for conspiring to distribute large quantities of drugs, I would be sure –

Q. You are just making an assumption, then, are you not?

A. If that is an assumption, yes.

Q. Let's limit it to what we know of the testimony. The testimony at the grand jury as you related it to His Honor is that Mr. Libretti said he didn't know his son [100] was going to send him the ranch.

A. That's correct.

Q. And you heard Mrs. Libretti say this morning that is exactly right, she did not know the ranch was coming from Joe as a partial repayment for what money had been sent to Joe, Jr., by his parents.

A. That is correct.

Q. What in that testimony, Agent Young, raises any inference of drug money?

A. None.

Q. Thank you. Now let's turn to Claudia Porter. She has made claim and you were here and you understand this to be true, do you not, for two pieces of property?

A. Yes.

Q. Those two pieces of property are $3300, approximately, in cash, and a diamond engagement ring, right?

A. That's correct. I thought it was $1300 however.

Q. You are correct. I believe – I think I misspoke. It's $1333.

A. Okay.

Q. I apologize. The ring, according to the testimony, was a gift to Miss Porter in approximately October of 1990?

A. That's correct.

[101] Q. The cash was a gift to Miss Porter in December of 1991?

A. That's incorrect.

Q. When was it?

A. She received the money in December of '91. That part's correct.

Q. And the testimony was it was a gift?

A. I heard her testimony today that she believed it to be a gift. Yes, I heard that.

Q. All right. Now, it was in April of 1992, according to your testimony, when Miss Porter said to you that she – let me find the quote here. Was foolish not to have known that Joe was involved in narcotics?

A. It was a save face statement on her part. Yes, I believe that's true.

Q. And that was in April of 1992?

A. Perhaps March as well.

Q. All right. After both of those transactions had occurred?

A. That's correct.

Q. Why don't you tell us what you know about the source of the funds that the ring was purchased with?

A. I don't know how that particular ring was purchased. I don't recall the – as I recall, it was purchased from a – the stone itself was purchased from a New York [102] jewelry or diamond broker. I don't recall how those particular funds were transferred.

Q. All right. You don't know which funds those were?

A. I don't know. The man had at that time many bank accounts and it was very difficult to follow.

Q. You testified for something like an hour on the statement related to you by a number of different witnesses and things that you learned from your own investigation of Joe Libretti regarding drug proceeds.

A. That's correct, yes.

Q. And you have opined to Judge Brimmer that Joe Libretti earned in excess of one million dollars from his drug business over that ten year period?

A. That would be my conservative estimate, yes.

Q. From what documents do you draw that conclusion?

A. Well, Joe Libretti's total earned income during this whole time.

Q. No. From what documents do you draw that conclusion?

A. From his bank records. From all the monies that is funneled through those bank records.

Q. Do you have those bank records?

A. We did, certainly.

Q. Do you still?

A. I don't know – yes. I think either we do or the [103] IRS does. You bet. Of course, I said I was cooperatively engaged in this investigation.

Q. And when I say "you," please understand that to mean the law enforcement people who were investigating this case.

A. Yes. Yes.

Q. What other records were used in your analysis – and I am, again, speaking of you collectively – to arrive at conclusions that Joe Libretti's drug income was in excess of a million dollars?

A. Those records that I told you about. His bank records, his expenditure records, his travel records, the statements from his defendants, the codefendants.

Now, again, I can't tell you about the statements if you want to know just about records.

Q. I just want you to right now just identify and not particularize records but classes of records, if you would.

A. Credit card statements, telephone bills, American Express credit cards, AT&T credit cards, bank accounts from, I think, 13 different banks in the Denver metropolitan area. Of course, the statement – all of his gun business records from those distributors that we were able to determine a course that the income wasn't coming from the sale of the firearms.

[104] Q. Anything else?

A. Well, no. Other records, no.

Q. That's the extent of the records that you have relied upon?

A. I would hate to tell you that is the only thing, because I don't recall. But as I recall now, yes, sir.

Q. And let me rephrase this in a slightly different way because I am not trying to pin you down to identifying each one as you sit here. It is true that your opinion comes in large part from the records you have reviewed?

A. That is correct.

Q. Did you have access to Mr. Libretti's tax returns, tax information?

A. Yes.

Q. And did you have records of the property transactions that might affect the land or the mobile home, et cetera?

A. Yes.

Q. Was there any group or class of records which you did not have access to that you needed in your investigation in your view?

A. I don't recall any right now.

Q. You were aware, of course, that Mr. Libretti was employed rather consistently from 1984, 1985 on?

A. Yes.

[105] Q. And that he, of course, received pay from his employment?

A. Yes.

Q. And you are aware, I trust, from review of bank accounts that he deposited his pay into his bank accounts?

A. Yes. Checks, yes.

Q. In fact, when you analyzed Judge Brimmer's question about commingled, when you refer to commingling, it was part drug transactions and some legitimate?

A. Some of those checks, yes.

Q. And some of that legitimate income would also have come from Mr. Libretti's firearm business?

A. Perhaps yes.

Q. You are aware from the tax returns, aren't you, that he earned income and reported income on that business?

A. Yes.

Q. And that would be money also deposited into these accounts?

A. Yes.

MR. O'DONNELL: All right. Your Honor, at this time that's all the questions I have. Because of the nature of this examination, if there is more later required, if the scope of this hearing extends, I reserve the right to recall Mr. Young.

THE COURT: Thank you, Mr. Young. You may step down.

MS. WOODHOUSE: I have a few additional questions, Your Honor.

THE COURT: All right. Go ahead.

REDIRECT EXAMINATION

Q. (BY MS. WOODHOUSE) Special Agent Young, are you aware that Dr. Libretti disclaimed any interest in this property during the time that he was present for his testimony in January of 1992?

A. Yes, I am.

Q. And that he subsequently mailed in the actual deed, the original deed, to the United States?

A. That's correct.

Q. And by doing so, he was further indicating that he had no interest in this property whatsoever?

A. That's correct.

Q. You're also aware that Claudia Porter disclaimed her interest in the ring by turning it over to you when she did in either March or April of 1992?

A. I felt that she did. She said she wanted nothing further to do with it.

Q. And she willingly told you that the money, the $1333 was not hers and that it was just the proceeds from that Wyochem Credit Union that she still had?

[107] A. That's correct. She indicated, again, per instructions from Joseph, that she had taken $8,000 and had wired it to Dee Smith in Chicago, Illinois, at Legal Research.

Q. Now, based upon your knowledge of the income that defendant had during the time that he was setting up his gun business, what is the source of funds that he used to obtain these firearms?

A. The sale of cocaine and marijuana.

Q. And do you know – I know that there's been an extensive study done on the actual profit that he made in his gun business. Are you aware of that figure?

A. Yes, I am.

Q. What is it?

A. From the time that he had his license to the time that he was arrested, he grossed no more than 7,500 from any sales of firearms.

Q. Grossed?

A. That's absent any of his expenses – postage, phone calls. That's absent that.

MS. WOODHOUSE: Nothing further, Your Honor.

MR. O'DONNELL: Your Honor, I do request the right to recross now on new matters raised.

THE COURT: Sure. You may.

[108] RECROSS-EXAMINATION

Q. (BY MR. O'DONNELL) You certainly don't mean to portray to His Honor that Miss Porter and Mrs. Libretti are not claiming the things that they say they are claiming today, are you?

A. I guess I don't understand your question.

Q. Well, I understood you to answer a question of Miss Woodhouse's that the Librettis disclaimed any interest in the Star Valley Ranch.

A. Mr. Libretti certainly indicated to us –

Q. That certain indication has been changed today, hasn't it?

A. She says otherwise.

Q. And today, as you heard His Honor say, is the day for claims to be made?

A. I did hear that, yes.

Q. And you heard a claim made?

A. I did.

Q. All right. Let's talk about gross revenues from the firearms business, Agent Young.

A. Yes.

Q. You say the maximum gross was $7500 from the firearms business from Mr. Libretti, total?

A. That's correct.

Q. From where do you get that figure?

[109] A. From the sales – every firearm that Joe Libretti sold, nearly every firearm. I didn't participate in every interview. The people who were interviewed – the forms have their names and address – they were interviewed. They detailed how much they spent. These amounts were compared against his invoices coming in, as well as his sales. He did have some sales to some government agencies. These were job lists and in many cases these guns he received, guns on trade from some police departments at prices that several individuals in the business told me were far greater than they would have paid, he paid greater, are greater.

MR. O'DONNELL: Your Honor, may I approach?

THE COURT: Sure.

Q. (BY MR. O'DONNELL) Let's do just one thing here, Agent Young. I am handing you one of the few records Joe Libretti possesses currently. It's a copy of his 1989 tax return, and I refer you to Schedule C – C1 of that tax return. Have you seen this page before?

A. I may have seen this page before, I don't recall specifically.

Q. Do you recognize what this page reports to the IRS? Let me ask it this way: Does this page report income from Mr. Libretti's; firearm business?

A. Yes, it does.

[110] Q. And it reports gross receipts in 1989 in excess of $56,000, doesn't it?

A. That's what it reports.

Q. Okay. Thank you. And I'm sure you would agree with me that each of the other years that Mr. Libretti was in business he reported gross receipts from his firearm business on his IRS tax forms, would you not?

A. I would not agree that – these particular forms that you just showed me right there, having interviewed the preparer of them, I know that they were filed after Joe Libretti knew that – we were investigating him, and that he had to show higher gross – we even have him claiming some gambling wins in there. He knows that the government is looking at him, but I don't believe the accuracy, but I will say that is what he filed. And he says he's willing to –

Q. He says he's willing to pay taxes on the gross receipts of $56,000?

A. He shows a net profit of less than $5,000.

THE COURT: What time was this '89 return filed?

THE WITNESS: I don't believe the '89 return was filed until '91.

Q. (BY MR. O'DONNELL) But your statement that there was a total of $7500 in gross receipts is not completely [111] accurate, is it?

A. Again, in gross receipts, I'm talking about that's the most money he could have made in the sale of firearms. Profit – profit, that is what I am trying to tell –

Q. Gross profit?

A. Gross profit. That is different than gross receipts. I am sorry. I am sorry. The most money he could have

profited from his business from the inception to the time he was arrested was $7500 gross.

Q. And upon what records do you rely in reaching that conclusion?

A. Interviews, the bank records showing the deposits of the purchaser's checks being deposited into his accounts compared to the invoices of the gun companies who sold him the guns.

Q. All right. And we are again talking about classes of records that you have available to you and are still available to you?

A. As far as I know, yes, sir.

MR. O'DONNELL: That is all I have.

THE COURT: Anything further?

MS. WOODHOUSE: Nothing further, Your Honor.

THE COURT: Thank you.

Call your next witness.

[112] MS. WOODHOUSE: Your Honor, at this time I guess I'm – I need to find out for sure if the claims by the Librettis concerning the cashier's checks and the GNMA certificates, the Seattle mortgage, Barclay's American Mortgage –

THE COURT: So far, there isn't a third party claim concerning those.

MS. WOODHOUSE: They were in a letter, Your Honor.

THE COURT: Joseph Libretti, Jr., has filed some sort of motions that apparently claim them.

MS. WOODHOUSE: Okay.

THE COURT: And we'll hear from him at the appropriate time, but I'm satisfied that those are drug money.

MS. WOODHOUSE: Thank you, Your Honor. If that third party claim has been waived.

THE COURT: Oh, yeah. Yeah. If they're – if those people aren't here today, they've waived it. And the Librettis, Dr. and Mrs., are claiming only the three items that they've spoken to, the two savings and loan association accounts and the lot in the Star Valley Ranch.

MS. WOODHOUSE: Your Honor, I would like to introduce the transcript of the grand jury testimony of [113] Dr. Libretti concerning the transfer of the Lincoln County property, I guess.

THE COURT: Any objection?

MR. O'DONNELL: You are introducing the grand jury testimony?

MS. WOODHOUSE: Yes.

MR. O'DONNELL: For what purpose?

MS. WOODHOUSE: Because it is his statement about the property at the time he was questioned under oath.

Your Honor, I would ask to substitute a copy. I have only the original there today, but we would like to mark that as Government's Exhibit No. 1.

THE COURT: It may be received.

(Government's Exhibit No. 1

received in evidence.)

MS. WOODHOUSE: And with that, we'll rest, Your Honor.

THE COURT: All right. Mr. O'Donnell?

THE COURT: Your Honor, in light of the response to the third party claims, I don't intend to produce any evidence. Now, there was, as I understood from your forfeiture order, the opportunity for Mr. Libretti to be heard independently.

THE COURT: I am going to hear him on the [114] various motions and claims that he's filed. But right now we're hearing the third party claims.

MR. O'DONNELL: On just the third party claims, Your Honor, we have no evidence to produce.

THE COURT: All right. Mrs. Libretti, I need to ask you this question: What was the amount that you and the doctor advanced to George Zunker for the attorney fees? You don't need to know the exact amount; do you know the approximate amount?

MRS. LIBRETTI: I believe I had forgotten about that. I believe it was about $15,000.

THE COURT: 15,000.

MRS. LIBRETTI: But like I say, I don't write the checks.

THE COURT: All right. Now, did you have anything else that you wanted to present?

MRS. LIBRETTI: Well, I'm a little confused about who is saying that we disclaimed the land, because we never asked for it.

THE COURT: Yes. Yes. I understand that.

MRS. LIBRETTI: The money that we gave to the lawyers to help our son was given out of love. We never asked for anything in return and this was just something that I think Joe wanted to do.

THE COURT: Okay. I think understand.

[115] Miss Porter, did you have anything further that you wanted to present?

MS. PORTER: No, Your Honor.

MRS. LIBRETTI: My next thing was when he was arrested – you keep talking about drug money. When he was arrested, we had no idea what he was arrested for and we knew he had Lakewood Firearms. We thought this had something to do with firearms. We had no idea about drugs. So, I just want you to know that.

THE COURT: All right. I'll take this matter under advisement. I haven't read Dr. Libretti's deposition yet, so that will be necessary to review before I can make a decision.

At this time, then, Mr. O'Donnell, you may proceed on Mr. Libretti's various motions.

MR. O'DONNELL: Thank you, Your Honor. To advise you on how I anticipate approaching this, may I have just your indulgence for a moment here.

Mr. Libretti, as you are aware, has filed a number of pro se motions not over my signature.

THE COURT: I understand, but you are his attorney today and you are presenting them and you are in charge of the presentation. And I'll hear whatever you and he wish to offer. Mr. Libretti isn't going to take the time of the Court however and waste its time [116] rambling on. I expect a rifle shot presentation on these matters of the salient features.

MR. O'DONNELL: All right. Your Honor, I can give you a rifle shot presentation of the guts of this case in about three minutes. I will do that right now.

THE COURT: That's about all we have, until noon.

MR. O'DONNELL: To load the chamber and pull the trigger, Your Honor, the United States has precluded Joe Libretti from meeting his burden of proof here today by its actions. This Court has denied Mr. Libretti the right to subpoena witnesses and documents to this hearing, and the United States government has refused to voluntarily provide those documents it has in its possession, which would enable Mr. Libretti to meet his burden of proof today that certain property within your forfeiture order is not properly forfeitable under the law.

THE COURT: Well, now, tell me just exactly what witnesses were desired? The motion was to have a certain number of subpoenas issued at government expense.

MR. O'DONNELL: Ten subpoenas in nine different states, I believe.

THE COURT: And it didn't say for whom they [117] were.

MR. O'DONNELL: That's correct, Your Honor.

THE COURT: And thus I couldn't tell that they were needed and indeed I'm still not sure. So you must tell me who you think would have been subpoenaed and what they would have said.

MR. O'DONNELL: I'd be happy to, Your Honor, and the answer to that is actually a blended answer, because the information and documents that were sought by subpoena, as we learned in today's hearing, are already in the possession of the United States government. And I directed and hand delivered a letter to Assistant United States Attorney Woodhouse on March 12 of this year identifying 12 specific categories of records to be produced for Mr. Libretti to prepare for this hearing and to use at this hearing.

Your Honor, this is the material that we would have sought by subpoena. What I would like to do for purposes of the record is append a copy of this letter as Mr. Libretti's Exhibit C to the record and provide you a copy so that you may see the identified categories of records.

THE COURT: Defendant's Exhibit C may be marked and admitted.

[118] (Defendant's Exhibit C marked

and received in evidence.)

MR. O'DONNELL: The purpose behind seeking access to these records, Your Honor, through either the subpoena route or through the voluntary production of

them by the United States, was to allow Mr. Libretti and myself to make an adequate presentation to you that the amount of drug proceeds in its maximum figure could be determined to be less than the value of the property which has been forfeited by this Court's order.

Assuming for the moment that we could prove that, because we do not have those records, that would mean, Your Honor, that parts of that forfeiture order would have to be amended because property would have been and is forfeited.

THE COURT: What I'm really interested in, there is a serious question as to Mr. Libretti's standing to make claims to this property.

MR. O'DONNELL: I agree, Your Honor.

THE COURT: The statute under which this proceeding is held refers to the claims of third parties.

MR. O'DONNELL: It does, Your Honor.

THE COURT: And where he's actually made the claims, not only for himself, but on behalf of his creditors and various people, there Miss Woodhouse in a [119] prehearing objected to standing, and I presume she will again. So we might as well face that issue head on.

MR. O'DONNELL: Certainly, Your Honor, I am happy to address that and that is a ticklish issue.

Mr. Libretti, under the law, does not have a standing to assert claims on behalf of third parties. As I understood your order, Your Honor, that was entitled just "Order" that set the hearing and the parameters of the hearing. Two things were to occur today, one was that

third party claims would be heard; and, two, that Mr. Libretti would be heard. And there was no explanation in the order on how he would be heard. I took that to mean that if there was something wrong with this Court's order, this would be the opportune time to bring it to Your Honor's attention to correct it now so we don't end up back here on a remand to correct something we do not have now. We cannot do that, Your Honor, because we do not have the records to do it with.

THE COURT: All right.

MR. O'DONNELL: That's the rifle shot of the case, Your Honor.

THE COURT: All right. Well, there is more to it than that. I think we'll have to take up these motions one by one and well do that after lunch.

[120] And do you have my calendar? All right. I am going to adjourn this hearing until 2:30. And I'm going to try to get all the other things that were supposed to be done during the afternoon done before then so that we can finish this hearing up.

MR. O'DONNELL: Thank you, Judge.

THE COURT: Estoral was set at 3 o'clock and you'll have to have him here at 2:15. And Ramirez is 2 o'clock. We'll leave it. And Yearout we will leave at 1:30. So that ought to be okay.

MR. O'DONNELL: 2:30, Your Honor?

THE COURT: All right, at 2:30. Now one other thing. Mrs. Libretti, I have your letter requesting the right to visit your son, and I conferred with the marshal on this

matter yesterday, and I understand that as soon as you got in town you got a chance to see him yesterday afternoon sometime after 3:00. And the marshal says that he will be glad to let you visit with your son, Joe, this afternoon while Joe is here in this building. So you can visit him here.

Now, as to your request to visit him tomorrow, it's Saturday, and we don't have a lot to say about that. That's up to the sheriff. And I understand that Bill Long was nice to you, as I'm glad to hear he was, and I sort of think that he'll let you visit tomorrow, [121] too. But you're probably on your own.

MRS. LIBRETTI: I was told I could for an hour today between 1:30 and 3:30 and that was it.

THE COURT: Now it's going to work out just perfect with our schedule.

MR. O'DONNELL: In the building right here.

THE COURT: Right here.

MR. O'DONNELL: And no weekend, apparently.

THE COURT: They said no weekend.

MR. O'DONNELL: I will be glad to assist with Mrs. Libretti in talking with Dr. Long.

THE COURT: See what you can do, Mike.

MRS. LIBRETTI: Thank you, Judge.

THE COURT: We will stand in recess in this matter until 2:30.

(Proceedings recessed 12:30 p.m.,

reconvened 2:40 p.m.)

THE COURT: Good afternoon, ladies and gentlemen. With regard to argument on these matters, would you rather argue it now, the third party claims, or at the end of the hearing on Mr. Libretti's motions?

MS. WOODHOUSE: Actually, we're prepared to go at any point, whatever the Court's pleasure is.

THE COURT: Let's go through the motions first then.

[122] I think I'll take them in the order in which they are filed, and the first motion that I have is a Motion and Petition to Amend the Order of Criminal Forfeiture Under Authority of Title 21 U.S.C. Section 853(n) (6)(A), and it's a motion that Joseph Libretti, Jr., filed on behalf of his father, which is signed by his father, but obviously he prepared it.

Did you wish to speak to this?

MR. O'DONNELL: Your Honor as I noted to you just before we broke for lunch, these motions have all been filed pro se, in fact one of these motions accuses me of ineffectiveness in representation. I find myself at a particular disadvantage.

THE COURT: Well, let Mr. Libretti speak briefly to each.

MR. O'DONNELL: All right, Judge.

THE COURT: Come forward and speak to it, Mr. Libretti.

MR. LIBRETTI: What is the title?

THE COURT: This is the first one you filed. It is the first one that has *United States* versus *Joseph Libretti. Jr., and Joseph Libretti, Sr., Third party claimant, pro se.*

MR. O'DONNELL: Your Honor, does that have a date stamp on it, the one you are looking at?

[123] THE COURT: It was filed January 19th.

MR. LIBRETTI: Who signed it?

THE COURT: Well, your father's signature, apparently, is there. There is an affidavit by you that is signed.

MR. LIBRETTI: So my father filed it?

THE COURT: I think it's obviously on your typewriter. I think that you filed it.

MR. O'DONNELL: Your Honor, that is not a motion that I have. I'm not aware of that one.

THE COURT: Well, do you want to speak to this?

MR. LIBRETTI: Sure. I'd be happy to.

THE COURT: It pertains to the claim of your father to the deed to the Star Valley Ranch lot.

MR. LIBRETTI: Oh, okay. Sure. Okay, as far as that goes, I want –

THE COURT: Now, tell me this: Are you going to testify in connection with this?

MR. LIBRETTI: Yes.

THE COURT: Well, then, the clerk will please place the defendant under oath.

(Defendant sworn.)

JOSEPH V. LIBRETTI, JR.,

called for examination in his own behalf, being first duly sworn under oath, testified as follows:

[124] MR. LIBRETTI: Yes. I wanted to show some tax returns and some W-2 forms that I have with me showing that I earned an amount of income more than ample to –

EXAMINATION

Q. (BY THE COURT) Well, you can just tell me about them.

A. Okay, if you will take my word for it. In 1989 my income from General Chemical alone was $48,775.

Q. Now, how was that paid to you?

A. In the form of a check.

Q. Well, you got a regular salary check that wasn't wired to the credit union?

A. No. That wasn't a direct deposit, no.

Q. All right. Then what did you do with it?

A. I would deposit the checks in one of three accounts at one of two banks.

Q. Where were they?

A. Well, one bank was Bank Western in Lakewood, Colorado.

Q. Great Western?

A. Bank Western. And the other two accounts consisted of a savings account and a checking account at the Wyochem Credit Union.

Q. All right. Now, which was your main account, your personal account? Was that the checking account at [125] Wyochem?

A. I would have to say that I made the majority of my deposits in the savings account at Wyochem.

Q. All right. Go ahead.

A. Okay. In addition, in 1989 the company supplied me with other fringe benefits that allowed me to save all of my earnings, mostly. They paid for the condominium that I lived in for the first two months. I was working up there full-time in September and October. They paid for all my food. They paid the phone bills for that property and they paid me to fly to Colorado every week. They paid for that.

So when Claudia Porter says she didn't know about any 57 plane trips to Colorado, it's because probably 50 of them occurred before we got our first date because the company was paying for all that.

Q. I see. Why did they do that?

A. In 1989.

Q. No. Why?

A. You know, it's like the company gave me $3,000 to buy rugs and drapes. Why did they do it? I don't know, but I didn't turn it down.

Q. Okay. Go ahead.

A. Okay. In 1991 I earned almost $53,000 in salary working at General Chemical and I have the W-2 form for [126] that.

Q. And your position was auditor or were you chief auditor?

A. Well, my title was accounting supervisor.

Q. I see, accounting supervisor.

A. Yeah. I reported to the controller.

Q. Now, does that mean you were a supervisor of accounts or does it mean that you were the supervisor of the accounting department?

A. The controller supervises the accounting department.

Q. I see.

A. I was in charge of the mine. We had a mine and a surface operation, and I did all the accounting for the mine, and I did all the payroll and other things like that. But I wasn't in charge of the accounting department. I did have someone above me.

Q. Right. All right. Go ahead.

A. And my point is that I don't think that we should proceed on the assumption that all these properties are drug proceeds, because they aren't.

Q. Well, was there a commingling of drug money with salary money in your Wyochem account?

A. Well, I can assure you, despite what's been testified to today, that there were no cash deposits in any Wyochem account in 1991.

[127] Q. Were no cash deposits in –

A. In 1991.

Q. Cash deposits would be drug money?

A. Not necessarily, no.

Q. But probably?

A. Well, I dispute that, too.

Q. Oh, now, I wasn't born yesterday.

A. Well, Your Honor, I wanted to subpoena some people today to have them testify that they were involved in other enterprises with me.

Q. All right. Well, let's go ahead. So there were some cash deposits in the Wyochem account?

A. There were in 1989 and 1990.

Q. But not in –

A. '91.

Q. – '91. Well, what money did you use to purchase the Star Valley lot?

A. Well, I bought that in '90, so I'm not going to dispute that some tainted funds were deposited in that account. But what I am going to – and what I would like

to show, if the government will be kind enough to provide me with my bank record which they took, which they haven't, that I probably didn't use any illegal money for that land. But I don't have those records.

MS. WOODHOUSE: Your Honor, if I may, all of [128] the bank records were provided during the course of the criminal trial to Mr. Truman. Every time we got records from subpoenas issued, we turned them over to him. There are copies. Boxes and boxes of documents were provided.

THE COURT: Of course, he's been excused from the case.

MR. LIBRETTI: Exactly.

THE COURT: And I presume he has kept his files and Mr. Libretti hasn't had access to them.

MR. O'DONNELL: That is exactly correct, Your Honor.

THE COURT: Well, we'll go ahead and do the best we can today.

MR. LIBRETTI: Okay.

Q. (BY THE COURT) Tell me what your recollections are with regard to where the origin of the monies was that paid for the lot. Did you pay for the lot in cash?

A. Well, everyone keeps saying cash. You mean did I walk in with a briefcase full of money? No. I did what most people do. I wrote a check.

Q. For 20,000 – 19,000 purchase price?

A. Nineteen two. But I'm guessing.

Q. And you wrote a check on what bank?

A. Wyochem.

[129] Q. All right. Well, what percentage of funds in Wyochem do you think were tainted and what percentage were not?

A. I have to say that a small, but significant, percent were tainted.

Q. What do you call that? Ten percent?

A. That's what I'm thinking, yeah.

Q. Um-hum.

A. Less than 20.

Q. All right. Go ahead, Mr. Libretti.

A. Okay. May I use that chart and a marker and give a presentation about my interpretation of the case?

Q. I haven't looked at the chart, but I'll be glad – oh, you meant the paper.

A. Yes.

Q. Oh, sure.

MS. WOODHOUSE: Your Honor, the defendant has no standing here to allege a third party interest in any of these properties. He hasn't challenged the actual forfeiture order as he should have by an appeal to the Tenth Circuit.

THE COURT: We'll still give him an opportunity to speak and be heard.

A. How about a marker? Okay. To begin with, I would like to provide examples of the three accounting methods [130] described in the Banco Cafetero Panama case. Assume the account has the following activity, starting with a zero balance. I'm supposed to make it clear that this applies to all the motions.

Q. All right.

A. First column will be deposits and withdrawals, second column will be the balance, and third column will be the amount subject to seizure.

Starting with a zero balance, $10,000 of legitimate wages is deposited in the bank account. A few weeks later $10,000 of proceeds derived from a violation of Title 21 United States Code Chapter 13 are deposited in the same account.

Q. That would be tainted.

A. Yes.

Q. Okay.

A. That is subject to seizure. Okay. Two weeks later, $10,000 of legitimate earnings are deposited in the account. Okay. The account now maintains a balance of $30,000. Of that $30,000, one third or $10,000 is illegal proceeds.

At this point the account holder writes a check on the account for the purchase of 18 machine guns at a total cost of $10,000. Okay.

The first method, the lowest intermediate [131] balance method has been described as the drugs in, last out

rule. Under this rule the tainted $10,000 remains balance in the account until the time when the account falls below this amount. As long as the account balance remains above $10,000, all deposits and withdrawals are immune from seizure. It is the account that if considered retraceable, held proceeds of $10,000.

Q. Incidentally, I am going to take from the court file – I'll hand you what appears to be your Exhibit A called "Account Activity," which is a photocopy of your Wyochem account.

A. Therefore, the 18 machine guns are purchased for 10,000, are immune from seizure. At this point another 18 machine guns are purchased for $10,000.

Q. So by your theory, they'd be tainted.

A. Not under the lowest intermediate balance theory, because the account still maintains a $10,000 balance. Thus it is as long as the account maintains $10,000 you're just –

Q. You're going on a FIFO theory, first in, first out.

A. But this theory, the lowest intermediate balance is drugs in, last out Banco Cafetero Panama case gave three different ways that money can be traced for an account –

Q. So, you're saying that the –

[132] A. under this theory.

Q. The Court should use a theory of the lowest –

A. I'm not saying they should use any theory, but I would like to know which one they are using so I can

show you that you can't say everything that I have is drug money. And that's what you're trying to do. You know, I've made almost $120,000 from General Chemical alone, yet everyone wants to ignore that. And that's not proceeds.

Q. Well, the testimony I have before me says that over this period of time that you were in the drug business, you made a million dollars.

A. I made $70,000, Your Honor, and I would like to see some evidence to the – it never happened.

Q. Go ahead.

A. See, I was going to subpoena these codefendants today, and they were going to testify what they sold it to me for, and the other ones were going to testify what they bought it from me for and you'd say my profit margin was not quite that generalized.

MR. O'DONNELL: Your Honor, if I might be able to aid under the FIFO and in this intermedial balance theory, all of those theories contemplate that nontainted properties is nonforfeitable, and I think that where Mr. Libretti's argument is heading.

[133] THE COURT: Yeah, I do too. He hasn't said it yet.

THE WITNESS: Well, I was going to do an exhibit. I was going to continue with this, if you'd like me to.

Q. (BY THE COURT) Do it quickly.

A. Well, it's not quick. That's what I'm telling you. It's going to take some time.

Q. We've got to finish tonight.

A. Okay. Okay. Like I said, another 18 machine guns are purchased for $10,000 and those are immune from seizure. It is the traceable proceeds from the extent of $10,000 that are subject to seizure.

Now, another nine machine guns are purchased for $5,000, so our account balance now dips below our $10,000 level. So at this point what is subject to seizure is that – is nine machine guns and the account for $5,000. That doesn't mean they can take the other 20 under this theory. Okay.

Now, $7,000 of legitimate earnings are deposited again. Okay. Now the account has a $12,000 balance. Okay. The traceable proceed subject to seizure still only includes 5,000 from the account and nine machine guns because the new lowest intermediate balance in the account is $5,000. All deposits and [134] withdrawals in this account are immune from seizure as long as the account balance is maintained at or above $5,000.

The account will always have some tainted funds in it until some time the withdrawal knocks the account balance down to zero. Only at this point would the account totally be clean. The tainted money would be last out hence the name is drugs in, last out.

The second method is the averaging method. Using the account activity from the previous example –

MR. O'DONNELL: Your Honor, may we mark and have this document admitted as Exhibit D?

THE COURT: Yes, you may.

(Defendant's Exhibit D marked and received in evidence.)

THE WITNESS: Using the account activity from the previous example, we have three $10,000 deposits of which one is tainted; one third is traceable proceeds subject to seizure. As before, the check is written against the account for the purchase of 18 machine guns for $10,000. Under the averaging rule, a prorata share of each withdrawal is tainted. Since one third of the account was illegal proceeds at the time of purchase, one third of every purchase is subject to seizure in addition to one third of the account.

[135] So, since 18 machine guns were bought at this point, six machines guns are subject to seizure, one third times 18 and one third of the $20,000 in the account is subject to seizure, approximately 6,000 – $6,666.67.

Any deposits into this account would decrease the percentage of tainted funds in the account. But the dollar amount of tainted funds would still be one third of $20,000 or $6,666.67.

If another $10,000 check is written against the account for the purchase of 18 machine guns, bringing the account balance down to 10,000 again, six of these machine guns are subject to seizure, one third of the purchase, and one third of the account balance or $3,333 is subject to seizure.

And the last method is – doesn't really have a name, it's just known as drugs in, first out. And under this method, the first purchase would be the first tainted money out of the account. And thus the first purchase of

ten machine guns – of 18 machine guns for $10,000 would be subject to seizure while the rest of the account is immune.

Q. (BY THE COURT) Well, the difficulty with – that I have, yours is a nice theory, but if you look at that account, you can't tell a thing by it except that I do [136] know that there is tainted money in there.

A. Right. We know there is 10,000.

Q. And the statute reads that all proceeds traceable to such an exchange for controlled substances are forfeitable, so at this point, I can trace that to that account. Tell me why it isn't forfeitable.

A. Because only $10,000 is proceeds. $30,000 is not proceeds.

MR. O'DONNELL: There is case law to support that proposition as well, Your Honor. The case is *United States* against *One 1980 Rolls Royce*, 905 Fed. 2d, page 89, Fifth Circuit case, in 1990 which essentially says, Your Honor, that you can avoid forfeiture to the extent of legitimate funds used or found.

THE COURT: Yeah. I think that's true.

MR. O'DONNELL: So in Mr. Libretti's example, whichever calculation method is used, there is nontainted funds in the account that are not properly subject to seizure or forfeiture under the statute.

Q. (BY THE COURT) All right. Well, go ahead.

A. Okay. Going to give you a little example from this account about how possibly an error was made. Okay. I'm looking at the 1991 savings account.

THE COURT: This may be marked Exhibit C.

MR. O'DONNELL: I think we,re to E, Your Honor.

[137] THE COURT: Are we? All right.

(Defendant's Exhibit E marked for identification.)

THE WITNESS: On May 7, we have a balance of $6,365 it appears to me. This is 1991 savings. Okay. On May 14th a deposit is made. It appears to be a General Chemical check. From the amount, it looks like 15,564. The balance is now 21,729.

There is another deposit on May 15th which happens to be the day we used to get paid there of $2,857 and our balance is 24,587.

On May 17th there is $175 deposit and our balance is 24,762.

May 20th a deposit looks like $94, leaving a balance of 24,856, rounding out – and then on May 20. And then there is a – May 20th there is a withdrawal. Looks like some firearms were purchased for $12,588, bringing our account balance down to 12,267. Now the government claims that this is all forfeitable, this whole 12,588 from there. Careful examination of these bank records, this is all drug money. But even these two deposits appear to be General Chemical deposits.

So even if all this $6,365 was dirty money, which it wasn't, and even if this $175 was and this $94 is, that's not even $7,000. But they are taking the [138] whole 12,588. Oh, that's drug proceeds, you know.

And, you know, even simple arithmetic proves that that just can't be true under any method you want to use. You want to use lowest intermediate balance, averaging or drugs in, first out, you just can't say that.

Q. Well, the testimony that you claim you haven't got today would be merely to the amount of profit that you made in the drug business. Is that what we're talking about?

A. Some of it, yes.

MR. O'DONNELL: As well as, Your Honor, identifying for Your Honor and for the record the source and amount of all clean money.

THE WITNESS: Yes. I was going to subpoena my employers, the rest of my tax records, coworkers, the casino in Las Vegas I stayed at. You know, I'd like to find this guy the government says I sold 200 pounds of pot to. I don't know who that could be, because I've never even seen 200 pounds of marijuana.

Q. (BY THE COURT) All right. Go ahead, Mr. Libretti.

A. Well, this is pretty much what I wanted to show.

THE COURT: I don't know, Mr. O'Donnell, of any case that says what the proper accounting method is.

MR. O'DONNELL: The Banco Cafetero Panama case [139] Mr. Libretti last cited to you – and I have, by the way, given the citation to your clerk, Your Honor – discusses three possible methods. In the Tenth Circuit I am not aware of any case.

THE COURT: I am not aware of one.

MR. O'DONNELL: Although we are all aware we need to do some kind of a calculation. What I suggest to Your Honor on behalf of Mr. Libretti, that in whatever method he used, there was some figure that is – that was nontainted funds. And that figure was not properly forfeitable unless other things were done, which have not been done.

For example, if the total value of Mr. Libretti's estate, for example, were less than the proven value of drug proceeds in total, there is an argument that could be made that the entire estate could suffer forfeiture.

I don't believe that that argument can hold water, Your Honor, in light of the case law. For example, the Rolls Royce case that I – that he cited to you that a division needs to be made of commingled assets. What I really think you have to do is just determine the figure in the appropriate time period that was clean money. And then that much of the property from that period of time it was forfeited is not [140] properly subject to forfeiture.

THE COURT: All right.

MR. O'DONNELL: And that's making an assumption that all property was forfeit. For example, if there was property not forfeit that may be well how the allegation can occur. We didn't have those records, Judge. I couldn't get that presentation ready for you, because I couldn't have access to the financial records.

THE COURT: Did you ask Mr. Truman for –

MR. O'DONNELL: I did. He said he had boxes that were a mess. Nothing was organized. He couldn't

find anything in them. I telephoned him, Your Honor, right after I was appointed on this case. The report is clear.

MR. LIBRETTI: Something else is that the prosecutor's statement in the presentence investigation report says about 37 kilos, and somehow in the last four months I must have bought 23 kilos of cocaine since I have been in prison, because now it's somehow multiplied to 60.

Q. (BY THE COURT) All right. Well, go ahead and make your argument here on this motion as well as any others. Let's get it over with.

A. Well, on this motion, I just want to say that the government hasn't even given these third party claimants [141] any facts to dispute. All they say is drug proceeds. Well, that only gives the claimant an opportunity to make a general denial and that is hardly a responsive pleading.

If, for example, Michael asked the officer about the diamond – when was it purchased? where was it bought? how was it paid for? – he says he doesn't know. He doesn't know how that diamond was paid for. But it's drug proceeds, it's forfeitable. I don't even think the government met their burden of proof for probable cause under that one, Your Honor.

Q. Well, how did you pay for it?

A. Why don't they tell us?

Q. You are on the stand now and you tell me how you paid for it.

A. I would like to make them to make the burden of proof.

Q. I just asked you the question. How did you pay for it?

A. I paid – do I have to answer this?

MR. O'DONNELL: I suppose you can stand on your right of silence, Mr. Libretti, but I recommend you answer the Judge's question.

A. It was not paid for by drug proceeds.

Q. (BY THE COURT) How did you pay for it?

[142] A. I sent a wire transfer to a gentleman in New York.

Q. That's the diamond broker from whom you bought the stone?

A. Yes.

Q. And how much money was that?

A. The total order was right around 2,900, and 2,850 of that was for the diamond.

Q. 2,800 how much?

A. 850, give or take 20 bucks, because I also bought a loop and some forceps.

MR. O'DONNELL: Your Honor, if I might make a suggestion regarding this issue, under the most resent pronouncement of the supreme court in the Buena Vista case even though we assume this ring was purchased entirely with tainted proceeds, that is not the issue we must focus on in the determination of today's case. Buena Vista looks at the state of mind of Miss Porter.

THE COURT: Yes. I have that in mind, too.

Q. (BY THE COURT) All right. Now, how much did you pay for its setting?

A. I already gave that receipt to you. It's in – I believe it's attached.

Q. That was for some jewelry company in Denver.

A. I think it was $4500 plus 25 for the appraisal.

Q. Did you pay for that in cash?

[143] A. No. I put it on my credit card.

Q. All right. So the ring's all paid for.

A. Yes. The ring –

Q. That was in 1989 –

A. No. It was late '90.

Q. – or late '90.

MR. O'DONNELL: October, I believe was Miss Porter's testimony, Your Honor, of 1990.

THE WITNESS: There were actually two payments. I paid for it in installments. I put a deposit down on the work before they started in October or November.

Q. (BY THE COURT) And at that time you were working at Green River?

A. Yes. I had made over $60,000 prior to that time working at General Chemical.

Q. All right. Did the $2850 that you wired to the diamond broker come out of your Wyochem account?

A. Yes.

Q. All right. Go ahead.

A. Okay. Well, I just wanted to read a little bit from the *United States* versus *Banco Cafetero Panama*, 797 Fed. 2d 1154, at 1159, Second Circuit 1986. It discusses the three approaches that I discussed earlier and then it says, "There is a plausible argument as –"

Q. What page?

[144] A. I'm on page 6 of the brief, but I'm quoting from page 1159 of the case.

"There is a plausible argument, as SONAL suggests, for cumulative forfeiture of all assets exchanged for drugs or drug proceeds. For example, if $100 from the sale of drugs is exchanged for a watch, both the $100 in the hands of the watch seller and the watch in the hands of the drug seller are vulnerable to traceable proceeds, and the government may well be entitled to forfeit both. However, cumulative forfeiture is not permissible simply because available accounting rules afford the government more than one route in tracing forfeitable proceeds. For example, if $100 from the sale of drugs is deposited in an account funded with untainted money, $100 in the account and each $100 withdrawal are all vulnerable to forfeiture, but the government can obtain only a single forfeiture of $100."

I mean, when I look at those bank account books today, you know, when the government is claiming this bank book and where the last deposit was made when I was 12 years old is drug proceeds, I don't see how they could have found probable cause for that.

MR. O'DONNELL: Your Honor, in my view, Mr. Libretti's arguments take us back to where I started [145] just before noon. The burden of the government is to demonstrate probable cause that a substantial connection exists between the property and the criminal activity.

Let's assume for a moment that the government has met their burden. Mr. Libretti's burden, under the case law, is to show by a preponderance – to show there is no connection. He has cited case law that will aid him in that process, but he doesn't have the facts. That is what we are policing the bank records to address the money.

THE COURT: Well, unfortunately, you've got me convinced.

MR. O'DONNELL: I was afraid that might happen.

THE COURT: All right. What I'm going to do is I'm going to remand this matter to the magistrate for a determination as to the –

MS. WOODHOUSE: May we speak first, Your Honor?

THE COURT: Well, I think I know what the law is, and we haven't – he hasn't had the facts that he needs to present it. And I don't think this hearing is fair.

MS. WOODHOUSE: Well, Your Honor, this is a third party hearing. It's not a place for him to challenge this. He's challenging on appeal.

THE COURT: The question before me is whether [146] or not the property that you are forfeiting is tainted or not.

MS. WOODHOUSE: That was resolved, Your Honor, when you entered a forfeiture order based on his CCE plea.

THE COURT: This Second Circuit case that he's cited, Banco something Panama does seem to hold exactly the way he says.

MS. WOODHOUSE: Did they have a plea agreement where the defendant agreed to give up all of this information, all this stuff, first? He agreed to do that, Your Honor, and an order was entered pursuant to his plea agreement and to the information that we had provided that this would be forfeited. This is the third party proceeding. He has no standing nor no right to be here.

MR. O'DONNELL: Your Honor, Miss Woodhouse misspeaks. Your order, Your Honor, provided for a broader hearing. And there is, indeed, authority for a broader hearing, Your Honor, in the case of *United States* versus *Sharir*, 755 Fed. Supp. 77.

THE COURT: Mr. Libretti, have you got some pages from the Court's exhibit?

MR. LIBRETTI: I don't think so.

MR. O'DONNELL: Yes, yes. I apologize, Your [147] Honor.

THE COURT: Okay. Go ahead, Mr. O'Donnell.

MR. O'DONNELL: Your Honor, fundamentally, what we are dealing with here, contrary to the assertions and the vitriol of the government, is Mr. Libretti, by his plea agreement, cannot stipulate to a penalty that is not provided for in the law, other than if property not subject

to forfeiture is being forfeited as he contends. That plea agreement cannot do that.

MS. WOODHOUSE: Your Honor, under 21 USC 853(p), we have a right to any substitute assets included in – including commingled assets, which is what both of these bank accounts are, including anything that will substitute for assets, which were diminished.

THE COURT: Miss Woodhouse, I'm going to know what the facts are before I do a thing.

MS. WOODHOUSE: But the facts are that he earned a million dollars and we only have $410,000 worth of assets. That's the only significant fact.

THE COURT: He is saying this is an unfair proceeding because he hasn't had a chance to subpoena the witnesses. I am going to let him subpoena the witnesses and have a hearing before the magistrate and let the magistrate determine what the facts are.

MS. WOODHOUSE: Your Honor, you are allowing [148] Mr. Libretti to make a fool of this Court and this proceeding.

THE COURT: No, I am not making a fool of this court. I don't think we ever make a fool of the court when we try to do justice. So, that will be what the rule will be and we'll all live by it. I think that this case of the *United States* versus *Banco Cafetero Panama* –

MS. WOODHOUSE: Which was not provided to us, Your Honor.

THE COURT: Oh, yes, it was.

MR. LIBRETTI: It's in my brief.

THE COURT: But this is the only case that is cited in the annotation that I've looked at in U.S. Code Annotated, which does indicate that the process in traceable proceeds of drug transactions is an accounting process and that you don't forfeit the whole account.

MR. O'DONNELL: With all due respect, Your Honor, there are other cases that approach it from a different angle.

THE COURT: I'm sure there are. Before I act on it, I'm going to know all the facts. I'm not going to know just part of the facts. So, under those circumstances, this hearing as to the defendant's motions will be continued before the magistrate.

[149] The defendant may have his subpoenas for the information.

Craig Truman will be required forthwith to deliver to you all of the information that the government has provided, so we don't have to do that twice.

MR. O'DONNELL: Your Honor, may I also request your assistance in either ordering or requesting the United States to cooperate with me in providing records it may already have in here in Cheyenne? And I don't want to do duplicate copying, I just want to get to the numbers.

THE COURT: Now, I shall be glad to hear your arguments with regard to the third party claims. First, Miss Woodhouse.

MS. WOODHOUSE: Thank you, Your Honor. It is the position of the United States that with regard to the ring that Claudia Porter is asserting an interest in, that she was well aware of the defendant's drug distribution activities and the fact that he had significant income as a result of those activities. She is also aware that he had been attempting to con –

THE COURT: Well, the issue really is, under this Buena Vista case, is she an innocent third party who got the property and isn't sure? Now, that's the [150] same thing they argued in the Buena Vista case, that the lady who got the – some sort of a house knew they were drug proceeds.

MS. WOODHOUSE: Your Honor, I didn't understand from reading the Buena Vista case that there was actual testimony to show that she was present during a drug action, that she had seen the cash monies being stuffed into briefcases which were then taken out of town and stored in a storage locker and hotels; that she was well aware and had arguments with the defendant about his drug business; that she was aware of his attempt to conceal this money by hauling it around to different places prior to receiving the house.

THE COURT: Well, that point of view would be arguing guilt by association basis.

MS. WOODHOUSE: It is not, Your Honor, it's arguing –

THE COURT: It argues that if you know that the defendant is dealing in drugs, that all your properties –

MS. WOODHOUSE: Well, Your Honor, she was also aware that even though she knew he had a job, that he had bought a brand-new Toyota Celica at $19,000, he had bought a truck at $16,000, he had bought property for $20,000, all prior – this far exceeds his income for [151] that year – prior to the time that he purchased this ring. That is not an innocent owner. She had knowledge, direct knowledge, and it's not guilt by association.

THE COURT: All right. Go ahead with the rest.

MS. WOODHOUSE: Not only that, Your Honor, but Miss Porter comes in as a coconspirator by her own admission. She went through all kinds of shenanigans to assist defendant in transferring and trying to hide assets of the defendant's from the government so that they would not be seized. She admitted that she went in a disguise to General Chemical for an attempt to get money so that we wouldn't find it. She also entered a false statement about the title for the trailer. She had no interest in that trailer. She didn't want the trailer, but she transferred it into her own name. She transferred the money into the bank account specifically so it would only be in her name, and this was the Wyochem money which had substantial drug deposits in it and she deposited – or she put that money in an account with only her name so that the government couldn't get it. She clearly was involved in his conspiracy to prohibit the government from getting proceeds, drug proceeds.

Your Honor, her credibility is in question. [152] Just let me give you one example. I wouldn't go into all of them, because I think they are fairly obvious, but when

she was up here testifying initially you asked her, "Was that $1300 for you or for him?"

And she said, "Well, it was kind of for him because I used it for his dogs and vets." And when she was up here testifying and Mr. O'Donnell asked her a question and she thought she knew what the answer was supposed to be, he said, "Was that a gift to you"?

"Oh, yes, it was a gift to me." When she had clearly said it was not a gift, it was just simply to help Mr. Libretti out with the care and feeding of his dogs.

She has not shown, Your Honor, that she is an innocent owner as to either the ring or the funds that she clearly knew were drug proceeds, and she clearly was assisting him in trying to avoid having the government seize those proceeds.

THE COURT: What is your position with regard to the First Federal and the LaSalle-Talman account.

MS. WOODHOUSE: Your Honor, our position as to those accounts is that the claim is not a proper third party claim. In 18 – or 21 USC Section 853, it says that in order to assert an interest, the person shall state that they personally have an interest in the [153] profit. The Librettis have not stated that they have an interest. They've simply stated –

MR. O'DONNELL: Your Honor, I object. That mischaracterizes the testimony.

THE COURT: Yes. Dr. and Mrs. Libretti are both named on the account along with the defendant.

MS. WOODHOUSE: They are named on the account, that's correct, Your Honor. But Mrs. Libretti said that she would probably just keep the money and give it to him later when he gets out of jail. There is no intention for them to keep it for themselves.

THE COURT: Mrs. Libretti has every right to do with her property what she wants.

MS. WOODHOUSE: Your Honor, she has not made a legitimate third party claim. Our other argument on that property is that it substitutes an asset for the asset that Mrs. Libretti has concealed from the United States and which we are not able to obtain today.

MR. O'DONNELL: Your Honor, that is beyond the scope of this hearing.

THE COURT: Well, I'm not ruling on any substitute asset theories.

All right. Now, what about the source of the accounts? The testimony I have before me shows that these were monies that were accumulated during the [154] defendant's childhood –

MS. WOODHOUSE: I'm not disputing that, Your Honor.

THE COURT: – and aren't the proceeds of drugs.

MS. WOODHOUSE: It appears that they probably were proceeds of some other activities of the defendant.

THE COURT: Well, that being the case, how can they be forfeited?

MS. WOODHOUSE: Your Honor, they can be forfeited because the defendant has taken numerous money out of the purview of the government and hidden it from – concealed it from us.

THE COURT: I don't know that he has. You might suspect that, but can you proove [sic] it?

MS. WOODHOUSE: Your Honor, we know that he made approximately a million dollars, and we only have $410,000 worth of assets to show for it.

THE COURT: All right. Anything further?

MS. WOODHOUSE: Yes. As to the Lincoln County property, Dr. Libretti clearly and unequivocally stated during his grand jury testimony that he received the deed without any forewarning; that he did not need the property, did not want the property, was not a bona fide purchaser for value of that property. He did not [155] receive it in consideration for the legal fees that he was paying for his son. He simply received it in the mail one day with no notice and had no idea of what it was. He didn't want the property.

THE COURT: I read the deposition at noon and my recollection is that he was notified by a letter postmarked December 24th, presumably it was a Christmas present, saying that he wanted to transfer the lot to him that he had purchased in Wyoming. And then thereafter he got the deed in the mail with a letter.

MS. WOODHOUSE: And did he not expect that property, want that property or make any agreement for that property, Your Honor? The fact that it may have been sent to him by the defendant is just one more attempt for

him to defraud the United States from behind the walls of prison in order to keep all of these assets away from the government.

THE COURT: All right. Anything further?

MS. WOODHOUSE: The Librettis have paid the legal fees and they have said so here today, out of the love and care for their son. They expected nothing in return and they should not be entitled to any kind of tainted property such as the Lincoln County property in order to pay those fees.

THE COURT: Is it not possible, under that [156] theory of accounting that the defendant presents, that this money was purchased with untainted funds?

MS. WOODHOUSE: Your Honor, if you – if you will review the accounts – and I guess now we will have a chance – these accounts are so unclear as to the certain transactions under FIFO, or whatever kind of theory you want to use, they are commingled accounts and under 853(p)(5), it says that if they have been commingled with other property and cannot be divided without difficulty, they shall be forfeited.

THE COURT: All right. We'll decide that when we know more about it.

MR. O'DONNELL: Thank you, Judge. My response is really very brief and entirely on the Buena Vista case. In Buena Vista it was 100 percent tainted. No question about it. And the Court said, "That's not the issue. The issue is what did that lady know about the fact of the purchase."

THE COURT: That's right.

MR. O'DONNELL: And she didn't know it was purchased with drug money, and that is the issue you have to decide with Miss Porter and Mrs. Libretti.

They have come before you and told you that they did not know these assets they claimed to have returned were purchased with drug money. Particularly [157] with Mrs. Libretti, regarding the childhood accounts and land.

Your Honor, I have appeared before you a long time and I have seen very few extraordinarily credible witnesses, but I found Mrs. Libretti to be extraordinarily credible. I don't think she knew anything was going on. They thought this was an attempt by their son to pay them back for monies they have given their son out of love. That means she gets to keep the property.

THE COURT: This was after he was in trouble.

MR. O'DONNELL: She acknowledged they didn't even know it was drug charges, they thought it was gun charges of some kind. That was her testimony to you.

THE COURT: All right.

MR. O'DONNELL: And then regarding Miss Porter, again, it's the same analysis, the supreme court, in fact, the quote from Justice Stevens' plurality opinion identifying the issue, says – the question is, and I quote, "When an owner's lack of knowledge of the fact that her home had been purchased with the proceeds of illegal drug transactions would prohibit her from being an innocent owner." It is not the inferential knowledge that the government presents to you that Miss Porter was hopelessly intertwined with Mr. Libretti, she is – she [158] was

living with him, she was in love with him, but she didn't know the fact that the ring may have been purchased with drug money or the fact that this remaining $1300 may be tainted money. That is the issue and it's got to be decided in favor of these third party claims.

THE COURT: All right. I am going to rule as far as I can on these matters, and we'll get them disposed of so as to limit the magistrate's discovery process.

First, with regard to the ring, I think that Claudia Porter had equally as good a basis for thinking that the ring came from legitimate funds, because the defendant was employed at that time, as she did to think that they were possibly from drug transactions, which at that point she was hoping that maybe he had ceased.

So I'm – I think the Court would be the biggest bully in the world if it went around taking ladies' rings from them. So I'm going to give the ring back.

And with regard to the $1300 account that's leftover [sic], I think that subject is going to have to await our accounting process. That is the windup of the Wyochem account, and I think it's – we're going to have to see what the accounting shows as to whether that's [159] tainted or not. I think there is a possibility that it's not tainted, and if that's the case, Miss Porter is the owner of that account and she would be able to have it.

With regard – the same ruling, I think, has to apply to the Star Valley property. I don't think we can tell whether the money that came out of the Wyochem account for that property is tainted or nontainted. I don't – I really think that the law is not that merely because a tainted dollar

goes into that account, the whole thing is forfeitable, which is really the effect of the government's argument. I don't think that's the law. It certainly isn't in the Second Circuit. And from what I can read in these and notations in USCA, it doesn't appear to me that that is the correct provision of law. And that's why I think we'll have to have this discovery process.

With regard to the two accounts at First Federal and the defendant's childhood home, wherever that was, and the account in the LaSalle-Talman institution, I think it's clear that those are not drug money nor are they tainted in any way. And I think at this point Dr. and Mrs. Libretti are the coowners [sic] with the defendant of the First Federal account, and I've forgotten the manner of ownership of the other one.

[160] MR. O'DONNELL: It was Dr. Libretti and his son, Your Honor.

THE COURT: Yes. I think that was right. So that there I think they are their accounts and those accounts are removed from the forfeiture.

And now that Mr. Libretti has access to some funds, I'm going to deny his motion that the United States supply him with money for a hair cut as well as other things. I think there was a motion for some medical care of some sort. And I think there's fund available for whatever is needed.

Now, with regard to the claims of the defendant that the AK-47's are the property of Michael Zak, no one from Michael Zak's estate has appeared before me today. Those

claims can't be asserted by Mr. Libretti and therefore those items shall remain forfeited.

With regard to the $550 due to Group Industries for guns or gun parts purchased, nobody has appeared for Group Industries, so therefore that's forfeited.

Mr. Libretti claims that $4871 ought to be paid from his forfeited assets to pay off the AT&T Universal card. It's merely an unsecured creditor; nobody appeared on behalf of AT&T, so that's forfeited.

And with regard to the $729 due Heckler and Koch, an importer of firearms, nobody has appeared on [161] their behalf and that is forfeited.

So the defendant's motions with regard to those pieces of property are denied.

With regard to the cashier's checks and the GNMA and FNMA securities, I don't think there is any way we can tell yet whether those are a proceeds of drug transactions or not until we go through this accounting process, so we'll reserve ruling on that.

But Mr. Libretti is reminded that I do not have any record of those certificates. And you are required to turn those in. And I require it PDQ.

Oh, yes, the motion was to recognize your indigence status and give you a haircut, eyeglasses, preventive dental care, and medical attention. If you've got some money now, you can receive what you need to out of that.

Let's see. Oh, yes. The order shall be that the government shall continue to maintain the status quo of the property until the Court has finally heard the matter. And

it is my intent that you shall have all the subpoenas duces tecum and subpoenas that you need to prove your case.

MR. O'DONNELL: And, Your Honor, so that it's clear, I'll make every effort to obtain the records locally and where it's not going to cost anybody [162] anything.

THE COURT: I think that's the way to do it. All right. Is there anything further?

MS. WOODHOUSE: Just one thing, Your Honor. We found out after the last hearing that our certificate numbers for the Barclay's GNMA certificate was not properly given as far as the number. It was in the proper name, and that's the way they searched for it. But I have a letter here that informs us of the proper name and we would ask that Mr. Libretti – number, excuse me – that the defendant be required to provide that certificate.

THE COURT: Well, he, of course, being in custody, can't provide it, but he can tell you where it can be located and I am requiring him to do that. You may have a copy of this letter, Mr. O'Donnell.

MR. O'DONNELL: Thank you, Your Honor.

THE COURT: I will give it to the clerk and she can furnish you with a copy.

All right. Now is there anything else.

MS. WOODHOUSE: Your Honor, just for our information, in the magistrate's hearing, will there be established a particular form of accounting or will that be a subject of argument?

THE COURT: That's going to be a subject of [163] argument. Apparently, according to the Second Circuit, there are three different ways of accounting for drug proceeds in a commingled account. And I think we're going to have to divine what the Tenth Circuit would adopt. I would guess that the Tenth Circuit might very likely follow the Second Circuit ruling. That would be my guess. But I don't have the faintest idea of what they really will do.

MS. WOODHOUSE: Your Honor, will the United States be required then to show each and every item that is listed in the forfeiture order or just those being contested as of this hearing?

MR. O'DONNELL: Well, Your Honor, we're contesting everything generally because we need to trace the source of the funds.

THE COURT: I understand he's contesting everything. I think you're going to have to do some tracing here, at least in these commingled accounts, with regard to the – like those condominiums and whatnot. I suppose that's somehow or another going to have to be shown to some extent. You probably wouldn't be able to show with great precision, but you'll have to make a prima facie hearing.

My point is that I think my denial of his request for subpoenas were probably improper and that [164] he's convinced me now that he ought to have that chance. What he shows at the hearing, I think will have to be another matter. And we'll have the magistrate's recommendation on that. I presume that will go forward in

April. I wouldn't be here, but the magistrate will, that's why I've assigned it to the magistrate.

MR. O'DONNELL: Judge, so that the magistrate is clear on what you are asking him to do, he will make an advisory ruling and advisory fact findings.

THE COURT: Right.

MR. O'DONNELL: Okay. Thank you very much.

THE COURT: Thanks very much.

MS. WOODHOUSE: Thank you, Your Honor.

(Hearing proceedings concluded 3:50 p.m., March 26, 1993.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

(Caption Omitted In Printing)

ORDER AMENDING DECEMBER 23, 1992 FORFEITURE ORDER

(Filed Apr. 2, 1993)

This matter comes before the Court on March 26, 1993. The Court, having considered the materials on file both in support of and in opposition to the motions, having considered the arguments of counsel, and being fully advised in the premises, FINDS and ORDERS as follows:

BACKGROUND

Joseph Libretti ("Libretti") pleaded guilty to Count 6 of the superseding indictment, which charged him with engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848. On December 23, 1992, Libretti was sentenced to 240 months incarceration and was fined $5,000. Certain assets owned by Libretti were seized by the government pursuant to an order entered by this Court on December 23, 1992, in accordance with the criminal forfeiture statute, 21 U.S.C. § 853(a) (1992), which provides:

> **(a) Property subject to criminal forfeiture**
> Any person convicted of a violation of this subchapter . . . punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –

> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
> (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

Libretti filed a motion for stay of execution of order of criminal forfeiture, and to amend the order of criminal forfeiture. In addition, Joseph Libretti Sr. (Libretti's father) and Claudia Porter filed motions for return of property pursuant to 21 U.S.C. 853(n)(6)(A) and (B), which provides:

> **(n) Third party interest**
> (6) If, after the hearing, the court determines that the petitioner has established by a **preponderance of the evidence** that –
>
> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or

> interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or (B) The petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;
>
> the court shall amend the order of forfeiture in accordance with its determination. (emphasis added).

On February 12, 1993, the Court ordered the government to maintain the status quo on all forfeited property pending this hearing. The Court however, made an exception allowing the government to sell two condominiums located at 9430 and 9328 West Ontario Drive, Littleton, Colorado. The Court further ordered the government to notify all parties known to be claiming an interest in the forfeited property of this hearing.

DISCUSSION

Third Party Interests

Notice of forfeiture was published three times from January 6, 1993 to January 21, 1993, pursuant to 21 U.S.C. § 853(n) in the following newspapers: (1) Green River Star, Green River, Wyoming; (2) Chicago Tribune, Chicago, Illinois; (3) Kemmerer Gazette, Kemmerer, Wyoming; (4) Wyoming State Tribune, Cheyenne, Wyoming; and (5) The Rocky Mountain News, Denver, Colorado. In addition, the following people were notified of this hearing by a letter dated February 19, 1993, sent by certified mail return receipt requested: Mr. and Mrs. Edward Zak, Mr. and Mrs. Joseph Libretti Sr., AT&T Universal Card, Heckler & Koch Inc., Claudia Porter, and Group Industries.

The United States, in seeking forfeiture, "must establish probable cause to believe that a substantial connection exists between the property to be forfeited and an illegal exchange of a controlled substance." *U.S. v. One Single Family Residence Located at 15603 85th Avenue North, Lake Park, Palm Beach County, Florida*, 933 F.2d 976, 979 (11th Cir. 1991). "Once the government has met its burden of showing probable cause to institute the forfeiture action, the burden then shifts to the claimant to show by a preponderance of the evidence that the property was not subject to forfeiture." *United States v. Twenty-Two Thousand, Two Hundred Eighty Seven Dollars ($22,287.00), United States Currency*, 709 F.2d 442, 446 (6th Cir. 1983); *see also United States v. One Parcel of Real Property With Buildings, Appurtenances, and Improvements, Known as Plat 20, Lot 17, Great Harbor Neck, New Shoreham, Rhode Island*, 960 F.2d 200, 204 (1st Cir. 1992).

The criminal forfeiture statutes protect innocent owners of forfeited property. This protection is not limited to bona fide purchasers. *United States v. A Parcel of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey*, 113 S. Ct. 1116, 1134 (1993).

21 U.S.C. § 881(a)(6) provides that:

> [N]o property shall be forfeited . . . to the extent of the interest of an owner, by reason of any act or omission established by that owner to have

been committed or omitted without the knowledge or consent of that owner.

This clause "exempts certain proceeds – proceeds owned by one unaware of their criminal course from forfeiture." *Buena Vista* at 1136. This is known as the "innocent owner" defense. Thus, property is not forfeitable unless (1) it can be traced to illegal sales of controlled substances; and (2) there is no innocent owner.

Mrs. Joseph Libretti (defendant's mother) and Claudia Porter appeared at the hearing to assert their interests in certain forfeited property.

(1) $1,333.45 to Claudia Porter

In December of 1990, Porter used a power of attorney from Libretti to transfer $9,333.45 from Libretti's Wyochem account to her personal account in State Bank of Green River. Porter sent $8,000 from this account to Legal Research in Chicago, Illinois for Libretti's defense costs. The remaining $1,333.45 was frozen, and subsequently taken by the government pursuant to the December 23, 1992 forfeiture order.

Porter argues that she should be able to keep the $1,333.45 as compensation for services rendered and expenditures made in caring for Libretti's dogs. Porter asserts that she thought these funds were legitimate. The government counters that the funds were "tainted," and that Porter knew it.

Libretti's testimony at the hearing established that at least a portion of the Wyochem account consisted of tainted funds, however, it is unclear what percentage.

The government argues that because a portion of the funds can be tied to illegal drug sales, that the full amount in the account should be forfeited.[1]

In certain circumstances, even though only **part** of a person's property is tainted, the whole property may be subject to forfeiture. Section 853(a)(2) provides that "any of the person's property used, or intended to be used, in

---

[1] The government also asserts a "substitute asset" theory. Because Libretti allegedly made in excess of $1,000,000 in drug trafficking, and the total value of the assets forfeited is significantly less, the government argues that all of the funds in the account should be forfeited as "substitue assets," even though only a portion is tainted.

21 U.S.C. § 853(p) provides:

> (p) **Forfeiture of substitute property**
> If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant –
>
> (1) cannot be located upon the exercise of due diligence;
>
> (2) has been transferred or sold to, or deposited with, a third party;
>
> (3) has been placed beyond the jurisdiction of the court;
>
> (4) has been substantially diminished in value; or
>
> (5) has been commingled with other property which cannot be divided without difficulty;
>
> the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

However, the government has not met its burden of proof that property subject to criminal forfeiture pursuant to § 853(a) falls into one of the five categories listed above, and that substitute assets should be forfeited in lieu of these assets.

any manner or part, to commit, or to facilitate the commission of, such violation" shall be forfeited. (emphasis added). The Tenth Circuit interpreted § 853(a)(2) in *United States v. Harris*, 903 F.2d 770, 777 (10th Cir. 1990). In that case, the Tenth Circuit held that $413,493 in cash, which was found in a vehicle along with three-quarters of a pound of marijuana and other drug paraphernalia, was properly forfeited because the $413,493 was used or was intended to be used to facilitate the illegal activity. *Id.*

However, this case is different. The government has not argued that the funds in Libretti's Wyochem account were used directly to facilitate an illegal activity. Therefore, the analysis of § 853(a)(2) in *Harris* is not directly in point. Rather, the proper focus is on § 853(a)(1) and § 881(a)(6). Section 853(a)(1) provides that "any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation" shall be forfeited. Section 881(a)(6) provides that:

> All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, **all proceeds traceable** to such exchange . . . [shall be subject to forfeiture]. (emphasis added).

The key is that under these provisions, only property that is traceable to the illegal transaction is forfeitable. *United States v. One 1980 Rolls Royce*, 905 F.2d 89, 91-92 (5th Cir. 1990) ("We conclude that a court should not grant summary judgment and permit the complete forfeiture of all properties when there is evidence that the properties were purchased at least in part with legitimate

funds. Though the burden will be on the claimant . . . , he should be permitted to establish what portions of the properties were purchased with legitimate funds."); *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986); *United States v. Certain Real Property Located at 2323 Charms Road, Milford Township*, 726 F. Supp. 164, 169-70 (E.D. Mich. 1989); *United States v. One Parcel of Real Property With Buildings*, 705 F. Supp. 710 (D. R.I. 1989) *vacated on other grounds by* 970 F.2d 370 (1st Cir. 1990).

This Court agrees with the Fifth Circuit, when it stated that:

> [T]he interest acquired as a result of mortgage payments made with the proceeds of drug transactions should be forfeitable. We do not believe, however, that forfeitability spreads like a disease from one infected mortgage payment to the entire interest in the property acquired prior to the payment. After all, only the actual proceeds of drug transactions are forfeitable. Unless section 881(a)(6) deprives persons accused of dealing drugs of the right to own any property, the existence of an undivided interest in a felon's property which constitutes proceeds cannot mean that his entire property is proceeds.

One 1980 Rolls Royce 905 F.2d at 90 *quoting Real Property Located at 2323 Charms Rd.* 726 F. Supp. at 169-79. Applying this reasoning to the instant case, the Court holds that the mere fact that a portion of Libretti's Wyochem account is tainted, does not mean that the entire account is forfeitable. *Banco Cafetero Panama* 797 F.2d at 1159.

It is unclear from the testimony at this hearing what portion of Libretti's Wyochem account can be traced to an

illegal transaction. Without this information, it is also unclear what portion of the $1,333.45, which was been claimed by Porter, is traceable to an illegal transaction. If none of the money is traceable to an illegal transaction, the $1,333.45 should be remitted to Porter. Even if all, or a portion of the $1,333.45 can be traced to an illegal transaction, Porter may still be entitled to the full amount if she can show by a preponderance of the evidence that she is an innocent owner. 21 U.S.C. § 881(a)(6).

The Court orders that a hearing be held before the magistrate to make findings of fact as to the source of funds in the Wyochem account. The Court will reserve ruling on the disposition of the $1,333.45 claim made by Porter.

(2) Two Piece Diamond Engagement Ring to Claudia Porter

In October of 1990, Libretti gave Porter a diamond ring set valued at $2,850. Testimony showed that Libretti and Porter had an intimate relationship from November of 1989 through December of 1991.

After hearing testimony, the Court finds that the diamond ring set was purchased with legitimate funds. The Court also finds that Porter is an innocent owner of the diamond ring set, having no knowledge that any funds traceable to illegal acts were used to purchase the set.

(3) Star Valley Property valued at $19,200 to Joseph Libretti Sr.

After Libretti was arrested, in December of 1991, Joseph Libretti Sr. paid a retainer to an attorney on behalf of his son, in the approximate amount of $15,000. Subsequently, Libretti conveyed real property to his father having the following description: Township 35 North, Range 118 West, Section 31, Lot 39 of Star Valley Ranch, Plat 10, Lincoln County, Wyoming. Testimony at the hearing established that Libretti purchased the Star Valley property in August of 1990, by check from his Wyochem account in the approximate amount of $19,200.

Mrs. Libretti testified that she and her husband, Joe Libretti Sr., thought that their son had two sources of income: a firearms business located in Lakewood, Colorado, and his job at General Chemical. Mrs. Libretti testified that she and her husband were unaware that their son was involved in illegal drug transactions. Therefore, they had no knowledge that the proceeds used to buy the Star Valley property may have been tainted.

The Court reserves ruling on the disposition of this property, and orders that the magistrate conduct a hearing to determine the source of the funds used to purchase the property.

(4) First Federal Bank for Saving, Account # 38103-8 and Lasalle Talman Bank, Account # 460079767

Mrs. Libretti was uncertain of the amounts in these bank accounts, but stated that they were "not great amounts." The First Federal account was opened when Libretti was a young boy. Birthday money and allowances

were deposited in the account. When pushed to give an approximate amount, Mrs. Libretti estimated that $700 was in the account. The last deposit in this account was made on July 7, 1975.

Libretti opened the Lasalle Talman account when he was in high school. The last deposit in this account was made on December 28, 1981.

The named owners of the First Federal account are Joseph V. Libretti, Jr., Beverly E. Libretti, and Joseph V. Libretti, joint tenants with the right of survivorship. The named owners of the Lasalle Talman account are Joseph V. Libretti Jr., and Joseph V. Libretti, joint tenants with the right of survivorship.

The Court finds that these proceeds are not traceable to illegal drug transactions, and that Mr. Libretti, as a joint tenant on both accounts has standing to assert his interest in the accounts. Because there is no nexus between these funds and Libretti's illegal drug transactions, it is ordered that the government immediately return the passbooks to these two accounts to Mr. and Mrs. Libretti together with the monies withdrawn by the government plus interest at a rate of 3.21% per anum running from the date the funds were withdrawn.

(5) Other Third Party Claims

Although proper notice was given, no other parties appeared at the hearing to assert their third party interests pursuant to 21 U.S.C. § 853(n). The Court holds that any third party interests that were not asserted at the March 26, 1993 hearing are waived.

Libretti's Interests

On October 5, 1992, Libretti entered into a plea agreement in which he agreed to forfeit all of the property listed in the Motion for Entry of Forfeiture Order filed by the government on December 23, 1992, pursuant to 21 U.S.C. § 853. In accordance with this plea agreement, the Court entered an Order of Forfeiture, which was filed on December 23, 1992. Subsequently, Libretti asserted interests in the forfeited property. The government argues that Libretti already agreed to forfeit specific property in the plea agreement, and therefore he has no right to claim an interest in that property.

However, after further review of the plea agreement and the December 23, 1992 Order of Forfeiture, the Court has determined that it may be unjust to enforce the specific forfeiture provisions in the plea agreement. Forfeiture statutes do not mandate forfeiture of property purchased with legitimate funds. *United States v. One 1980 Rolls Royce, VIN # SRL 390955*, 905 F.2d 89, 90 (5th Cir. 1990) ("We do not believe . . . that forfeitability spreads like a disease. . . . ").

It is also important to note that "a defendant's concession in a plea agreement to the forfeiture of his property 'does not make it so.' " *United States v. Boatner*, 966 F.2d 1575, 1581 (11th Cir. 1992) *citing United States v. Reckmeyer*, 786 F.2d 1216, 1222 (4th Cir. 1986); *see also United States v. Roberts*, 749 F.2d 404, 409 (7th Cir. 1984) *cert. denied* 479 U.S. 850 (1986) ("The mere fact that the defendant has agreed an item is forfeitable in a plea agreement, does not make it so.").

Finally, this Court is not bound to accept the forfeiture provisions in a plea agreement. FED. R. CRIM. P. 11(e)(4). Indeed, the Court may have some obligation in relation to the plea agreement to provide safeguards to "insure the defendant what is reasonably due in the circumstances." *United States v. Baldacchino*, 762 F.2d 170 (1st Cir. 1985); *Santobello v. New York*, 404 U.S. 257 (1971).

THEREFORE it is

ORDERED that the Magistrate conduct a fact finding hearing in which Libretti is given an opportunity to show by a preponderance of the evidence that his property is not subject to forfeiture. The Magistrate will also make findings of fact as to the source of funds in the Wyochem account as it pertains to the $1,333.45 claimed by Claudia Porter, and the $19,200 used to purchase the Star Valley property.

ORDERED that the government immediately return the diamond ring set to Claudia Porter.

ORDERED that the government immediately return the passbooks from the First Federal and Lasalle Talman accounts to Mr. and Mrs. Libretti together with the monies withdrawn by the government plus interest at a rate of 3.21% per anum running from the date the funds were withdrawn.

ORDERED that the rights of third parties who failed to make claims to forfeited property at the hearing, after proper notice was given, are waived. This includes the rights of Michael Zak, Group Industries, AT&T Universal Card, and Heckler & Koch.

ORDERED that Libretti's motion for stay of execution of the order of criminal forfeiture be **DENIED.**

ORDERED that the Libretti's motion for issuance of subpoenas duces tecum in forma pauperis be **GRANTED.**

ORDERED that Libretti's motion for and extension of time to file a notice of appeal in order to appeal the $50 special assessment is **DENIED.**

ORDERED that Libretti's motion to compel the Laramie County Detention Center to recognize his indigent status and to provide him with free haircuts, eyeglasses, preventive dental care, and medical attention is **DENIED.**

ORDERED that Dr. Joseph Libretti's motion for third party interests in cashiers checks and GNMA and FNMA securities pursuant to 21 U.S.C. § 853(n)(6)(A) is **DENIED.**

ORDERED that Libretti's motion for appointment of counsel and request for $2,500 to enable him to make a good faith effort to comply with this Court's order compelling Libretti to turn GNMA certificates over to the government is **DENIED.**

ORDERED that Libretti's motions for return of property under FED. R. CRIM. P. 41(e) are **DENIED.**

ORDERED that the government maintain the status quo of all forfeited property pending the magistrate's hearing, and this Court's subsequent rulings on whether Libretti has any legitimate claim to forfeited property, whether Dr. and Mrs. Libretti have a legitimate claim to

the Star Valley property, and whether Claudia Porter has a legitimate claim to the $1,333.45.

Dated this 2nd day of April, 1993.

/s/ illegible
UNITED STATES
DISTRICT JUDGE

UNITED STATES of America,
Plaintiff-Appellee,

v.

Joseph V. LIBRETTI, Jr.
Defendant-Appellant.

No. 93-8000.

United States Court of Appeals,
Tenth Circuit.

Oct. 19, 1994.

David D. Freudenthal, U.S. Atty., David A. Kubichek, Asst. U.S. Atty., D. Wyo., Casper, WY, for plaintiff-appellee.

Michael G. Katz, Federal Public Defender, Jenine Jensen, Asst. Federal Public Defender, Denver, CO, for defendant-appellant.

Defendant-appellant Joseph V. Libretti, Jr. also filed pro se briefs.

Before LOGAN and BARRETT, Circuit Judges, and RUSSELL,* District Judge.

LOGAN, Circuit Judge.

Defendant Joseph V. Libretti, Jr. appeals from an order of criminal forfeiture. He contends that (1) the district court erred in not making factual findings as to the forfeitability of assets; (2) he was not advised of and did not waive his right to a jury trial on the forfeiture

---

* Honorable David L. Russell, District Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

issues; and (3) even if his assets were properly forfeited, the forfeiture order violated the Excessive Fines Clause of the Eighth Amendment. We exercise jurisdiction under 18 U.S.C. § 3742(a) and affirm the order of forfeiture.[1]

A grand jury returned a superseding indictment against defendant containing eleven counts of various drug, firearms, and money laundering violations, including continuing criminal enterprise (CCE), 21 U.S.C. § 848. After one week of trial, defendant entered into a plea agreement. Pursuant to that agreement, he pleaded guilty to the CCE count and to forfeiture of "all known assets as prescribed in 21 U.S.C. § 853 and assets which are discovered at any later time up to $1,500,000." I R. tab 210 at 2. The plea agreement further provided that defendant would forfeit

> his right, title, and interest in all of his assets . . . including, but not limited to: all real estate; all personal property, including guns, the computer, and every other item now in the possession of the United States; all bank accounts, investments, retirement accounts, cash, cashier's checks, travelers checks, and funds of any kind.

Id. at 3. In exchange for defendant's plea agreement the government agreed to recommend the minimum sentence applicable to a CCE conviction, twenty years imprisonment, and not to pursue other criminal charges against him.

---

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a); 10th Cir.R. 34.1.9. The case is therefore ordered submitted without oral argument.

At the change of plea hearing, the district court questioned defendant regarding the voluntariness of his guilty plea. The district court also advised defendant about the forfeiture:

> And then under the topic Forfeiture, it alleges that upon conviction of the defendant for engaging in a continuing criminal enterprise, the United States is entitled to forfeiture of all property of any kind constituting or derived from proceeds [defendant] obtained directly and indirectly by engaging in said continuing criminal enterprise; all property of any kind which was used or intended for use in any manner or part to commit or to facilitate the commission of this criminal – continuing criminal enterprise, including but not limited to the following, and then there is listed real property, your lot in Star Valley, conveyances of two vehicles, cash proceeds over a hundred thousand dollars and then another $12,000 and a five – 5,100 and 7,600 amount in currency and jewelry and property consisting of a mobile home and a computer system, bank accounts that are listed in the Indictment, investments that are listed in the Indictment, the additional cashier's checks and the contents of safe deposit boxes, and that's it.

II R. 18-19. The district court further stated that the forfeiture applied to all property owned by defendant "by reason of any drug transaction." *Id.* at 21. Defendant admitted that he understood the indictment and plea agreement including the provisions concerning forfeiture. *Id.* at 19-21. The district court approved the plea agreement after determining the guilty plea was voluntary and factual.

The district court later sentenced defendant to twenty years imprisonment, five years supervised release, a $5,000 fine, a $50 special assessment, and 500 hours of community service.[2] The district court also granted forfeiture pursuant to the plea agreement. At the conclusion of the sentencing hearing, defendant objected to the failure of the district court to find a factual basis for the whole forfeiture. XIII R. 25 (record in appeal No. 93-8001). The district court noted the objection, but determined that there was sufficient evidence to warrant granting forfeiture. On December 23, 1992, the district court entered an order of forfeiture pursuant to 21 U.S.C. § 853. The order stated that defendant "agreed to forfeit all property," I R. tab 259 at 1, and then specifically listed property to be forfeited. Defendant appealed from the order of forfeiture.

Subsequently, the district court held a hearing on defendant's motions for stay and to amend the forfeiture order and on third party claims to the forfeited property, all made on or after January 19, 1993. On February 12, 1993, the district court determined that ownership of certain items of forfeited property was in dispute and that because it was willing to consider defendant's motion to amend, the December 23, 1992 order was not final. The district court stated that defendant's appeal was premature and then scheduled a hearing to consider ownership of the disputed property.

---

[2] Defendant appeals the imposition of the fine and the requirement of community service in appeal No. 93-8001, also decided and affirmed today.

After the hearing the district court amended the forfeiture order to delete certain property owned by third parties. The district court also ordered the magistrate judge to conduct fact finding hearings to address additional third party interests in certain property listed in the forfeiture order to consider whether it was in fact forfeitable. The government filed motions for reconsideration and to stay proceedings before the magistrate judge pending appeal. V R. tabs 353, 374 (record in appeal No. 93-8001). The district court granted the motion for stay.

I

We first consider whether the district court's actions after the notice of appeal was filed deprives us of jurisdiction.[3] We have jurisdiction to consider a final decision

---

[3] The government has also filed a motion to dismiss this appeal as moot. The government contends that because defendant pleaded guilty to CCE and consented to forfeit his assets he lacks a legally cognizable interest in the outcome of the appeal. "In general a case becomes moot ' "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." ' " *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396, 100 S.Ct. 1202, 1208-09, 63 L.Ed.2d 479 (1980), quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1950-51, 23 L.Ed.2d 491 (1969)). Because defendant has appealed the order of forfeiture, as is discussed hereafter, the issues in this case are still "live," and defendant has an interest in the outcome of this appeal. *Cf. United States v. Fischer*, 833 F.2d 647, 648 (7th Cir. 1987) (prosecutor's appeal from district court's order granting defendant reimbursement of funds was moot once forfeiture of funds was established under plea agreement and plea agreement and

of the district court. 28 U.S.C. § 1291. A sentencing decision is a final decision, *see Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798, 109 S.Ct. 1494, 1497-98, 103 L.Ed.2d 879 (1989); *United States v. Snell*, 922 F.2d 588, 590 (10th Cir.1990), and, as defendant concedes, a forfeiture is part of the criminal sentence. *United States v. Elgersma*, 971 F.2d 690, 694 (11th Cir.1992) (21 U.S.C. § 853(a) makes clear that forfeiture is part of punishment); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1577 (9th Cir.1989) (same), *cert. denied*, 497 U.S. 1003, 110 S.Ct. 3237, 111 L.Ed.2d 748 (1990); *United States v. Sandini*, 816 F.2d 869, 875 (3d Cir.1987) (same); *see United States v. Songer*, 842 F.2d 240, 241 (10th Cir.1988) (forfeiture treated as part of sentence).[4]

Although the district court has jurisdiction to consider third party claims to property, *see* 21 U.S.C. § 853(n) (providing means for third parties to obtain their property which has been forfeited), after a notice of appeal is

---

order of forfeiture were not contested). Accordingly, the appeal is not moot.

[4] If, however, a defendant timely moves to correct sentence pursuant to Fed.R.Crim.P. 35(c), that motion renders an otherwise final order nonfinal until the district court disposes of the motion. *United States v. Corey*, 999 F.2d 493, 494-96 & 496 n. 3 (10th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 574, 126 L.Ed.2d 473 (1993). Rule 35(c) permits the district court to correct a sentence imposed as a result of technical, arithmetic, or other clear error within seven days of the imposition of sentence. Here, defendant's request to amend the order of forfeiture was not made within the permissible time period and is therefore not a timely Rule 35(c) motion, *see Corey*, 999 F.2d at 494-96, and the requested modification of the forfeiture order was beyond the scope of Rule 35(c) relief.

filed, the district court lacks jurisdiction to consider a defendant's claims. *See Berman v. United States*, 302 U.S. 211, 214, 58 S.Ct. 164, 166, 82 L.Ed. 204 (1937). Thus, any subsequent actions by the district court do not defeat our jurisdiction.

II

Defendant argues that the district court erred in ordering forfeiture of the nonforfeitable property in light of his objection at the sentencing and the court's own post-judgment rulings. He alleges that factual findings must be made establishing that the assets to be forfeited are part of a continuing series of offenses. Defendant maintains that the trial testimony and change of plea and sentencing hearings show that there was not a sufficient nexus to support a forfeiture of accounts containing legitimate earnings such as his employees savings plan, IRA accounts, and bank accounts containing his paychecks.

Federal Rule of Criminal Procedure 11(f) provides that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."[5] The government contends that Rule 11(f) applies only to the guilty plea and imposes

---

[5] Defendant also contends that Fed.R.Crim.P. 32(c)(3)(D) requires factual findings when a defendant alleges an inaccuracy in the presentence report. Because the district court did not rely on any alleged inaccuracies in the presentence report when it entered its order of forfeiture, after defendant stipulated to forfeiture within his guilty plea, we focus our analysis on Rule 11(f).

no duty on the district court to ensure a sufficient factual basis exists to support the stipulated forfeiture in the plea agreement. Whether Rule 11(f) applies to a stipulated forfeiture in a plea agreement is an issue of first impression in this circuit. Four circuits have considered this issue and have reached divergent conclusions.

In *United States v. Roberts*, 749 F.2d 404, 409 (7th Cir.1984) (a RICO case), *cert. denied*, 470 U.S. 1058, 105 S.Ct. 1770, 84 L.Ed.2d 830 (1985),[6] the Seventh Circuit held that Rule 11(f) applies to forfeitures included as part of a plea agreement just as it applies to the guilty plea. "The mere fact that the defendant has agreed that an item is forfeitable, in a plea agreement, does not make it so; the trial court must ascertain whether it [is forfeitable]." *Id.* "A defendant's waiver of his right to trial cannot be said to have a factual basis, where a forfeiture of property is involved, unless the property is in fact subject to forfeiture." *Id.* at 410.

In *United States v. Reckmeyer*, 786 F.2d 1216 (4th Cir.), *cert. denied*, 479 U.S. 850, 107 S.Ct. 177, 93 L.Ed.2d 113 (1986), the Fourth Circuit agreed with the reasoning in *Roberts* that a defendant's mere agreement to forfeit an item in the plea agreement does not make the item forfeitable. The court held that Rule 11(f) "requires the district court to inquire beyond the agreement to determine if there is a factual basis for the forfeiture of the assets." *Id.*

---

[6] Cases applying the RICO forfeiture statute, 18 U.S.C. § 1963, may be used to construe § 853 due to the similarity of the two statutes. *United States v. Bissell*, 866 F.2d 1343, 1348 n. 3 (11th Cir.), *cert. denied*, 493 U.S. 849, 876, 110 S.Ct. 146, 213, 107 L.Ed.2d 104, 166 (1989).

at 1222. That court determined, however, that the record of the Rule 11 proceeding established a sufficient factual basis for the forfeiture.

The Fifth Circuit took a more lenient approach in *United States v. Bachynsky*, 949 F.2d at 722, 730 (5th Cir.1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 150, 121 L.Ed.2d 101 (1992), when it held "that the requirement of Rule 11(f) that the factual basis for a plea be established at the plea hearing does not apply to an order of forfeiture." It determined the district court's order of forfeiture would be upheld if the record provided a factual basis for forfeiture. *Id.* (citing *United States v. Crumbley*, 872 F.2d 975, 977 (11th Cir. 1989)). Although the court acknowledged the statement in *Reckmeyer* that a defendant's mere acquiescence in a plea agreement that an item is forfeitable does not make it so, it further recognized that the defendant's affirmative answers to questions at the plea hearing creates a substantial burden to overcome. Because the defendant in *Bachynsky* had never objected at sentencing to the forfeiture provisions of the plea agreement, nor provided evidence challenging whether the property was acquired or maintained by racketeering, the Fifth Circuit concluded that the defendant had not established an inadequate factual basis for the forfeiture.

The Eleventh Circuit rejected the analysis of *Reckmeyer* and *Roberts*. *United States v. Boatner*, 966 F.2d 1575, 1581 (11th Cir. 1992),[7] held "that a sentencing judge is not

---

[7] The Eleventh Circuit previously had this forfeiture issue before it in *Crumbley*, 872 F.2d 975. In that case the court assumed, without deciding, that Rule 11(f) applied to the forfeiture portion of the plea agreement and determined that the rule

required under Rule 11 to determine whether there is a factual basis for a defendant's concession to a criminal forfeiture pursuant to his plea bargain with the government." The court reasoned that because the forfeiture provision is "not a plea to a substantive charge, but a sanction to which the parties agree as a result of the defendant's plea," Rule 11(f) only applies to the guilty plea. *Id.* Because the defendant in *Boatner* agreed to forfeit property as a result of a bargained for exchange between the parties, the court affirmed the order of forfeiture.

We agree with the holding and reasoning in *Boatner*. The parties both acknowledge that criminal forfeiture under § 853 is a part of the sentence, not a part of the substantive offense. The courts in *Roberts*, *Reckmeyer*, and *Bachynsky* fail to note this distinction. We question whether the Seventh Circuit would continue to apply the holding in *Roberts* in light of its more recent determinations that forfeiture is not an element of the offense but rather is punishment for an offense when a conviction has been entered. *See United States v. Simone*, 931 F.2d 1186, 1199 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 584, 116 L.Ed.2d 609 (1991); *United States v. Herrero*, 893 F.2d 1512, 1541 (7th Cir.), *cert. denied*, 496 U.S. 927, 110 S.Ct. 2623, 110 L.Ed.2d 644 (1990).

In addition, it is settled law that a lawful plea agreement is enforceable. *United States. v. Khan*, 835 F.2d 749, 752 (10th Cir.1987), *cert. denied*, 487 U.S. 1222, 108 S.Ct.

---

is satisfied if the entire record provides a factual basis for the forfeiture. *Id.* at 976. *Boatner*, however, essentially overrules *Crumbley*. *See United States v. Herndon*, 982 F.2d 1411, 1417 (10th Cir. 1992).

2881, 101 L.Ed.2d 915 (1988). The government and a defendant and his attorney may arrive at a bargain "that a specific sentence is the appropriate disposition of the case." Fed.R.Crim.P. 11(e)(1)(C); *see United States v. Benchimol*, 471 U.S. 453, 455, 105 S.Ct. 2103, 2104-05, 85 L.Ed.2d 462 (1985). As long as the plea agreement is lawful, a defendant should be bound by its terms. *United States v. Alexander*, 869 F.2d 91, 94 (2d Cir.1989).

Defendant argues that the plea agreement and, therefore, his guilty plea, were not lawful and should not be enforced because he agreed to forfeit only the assets listed in the indictment or only property directly associated with the drug transactions. He contends that the plea agreement is ambiguous and vague and he would not have knowingly and voluntarily agreed to forfeit all of his property.

The voluntariness of a guilty plea is a question of federal law subject to de novo review. *United States v. Rhodes*, 913 F.2d 839, 843 (10th Cir.1990), *cert. denied*, 498 U.S. 1122, 111 S.Ct. 1079, 112 L.Ed.2d 1184 (1991). A guilty plea must be knowing and voluntary. *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971); *United States v. Elias*, 937 F.2d 1514, 1517 (10th Cir.1991). A defendant's decision to plead guilty must be deliberate and intelligent and chosen from available alternatives. *Rhodes*, 913 F.2d at 843. "[T]o determine whether a plea is voluntary, a court must assess whether the defendant fully understood the consequences of the plea." *United States v. Williams*, 919 F.2d 1451, 1456 (10th Cir.1990), *cert. denied*, 499 U.S. 968, 111 S.Ct. 1604, 113 L.Ed.2d 667 (1991). The defendant's attorney "and the

court have a duty to apprise the defendant of the consequences of the plea and ensure that it is voluntary." *Id.* Federal Rule of Criminal Procedure 11(c)(1) requires that a district court must, among other things, ensure the defendant understands the nature of the charge and the mandatory minimum and maximum penalties. *Elias*, 937 F.2d at 1517.

In this case, the district court thoroughly assessed whether defendant understood the consequences of the guilty plea. The court informed him that all property described in the CCE count of the indictment could be forfeited. II R. 7. Defendant only questioned the extent to which the $1,500,000 limit on forfeiture applied to future legitimate earnings. His attorney and the district court agreed that the $1,500,000 limit applied only to products of drug transactions and not to legitimate future earnings. *Id.* at 3-9. Thereafter, defendant stated that he had signed, read, and understood the plea agreement, and that he had no questions about it. *Id.* at 19-20. He further stated that he understood the consequences of his plea, including that all of his property owned by reason of any drug transaction could be forfeited. *Id.* at 21. Defendant conceded that he was pleading guilty because of the trial testimony received thus far. *Id.* at 22.

Nothing in the record indicates defendant's plea would have been different if he had been questioned further about forfeitability of his assets. He intended to forfeit all of his property without requiring the government to prove the assets were forfeitable. The plea agreement requires forfeiture pursuant to § 853, which includes forfeitable assets under § 853(a) and substitute

assets under § 853(p). *See also* 21 U.S.C. § 853(o) (§ 853 is to be liberally construed).

Further, defendant received a favorable plea agreement. In exchange for forfeiting all of his property, the government recommended the minimum sentence of twenty years imprisonment and agreed to drop all other counts in the indictment. One of those counts charged him with use of firearms with silencers in drug trafficking which mandates, upon conviction, a thirty-year sentence consecutive to the sentence on the underlying drug offense. Defendant entered into the plea agreement after the government presented overwhelming evidence of his guilt. He now seeks the benefit of that bargain, but only to the extent it favors him. We will not require the government to undergo a fact-finding hearing and forego a substantial benefit of its bargain.

We hold that defendant is bound by the terms of the plea agreement, *see Alexander*, 869 F.2d at 94, in which he unambiguously forfeited all of his property. The district court's extraneous statements that defendant was only forfeiting assets listed in the CCE count of the indictment or from his drug trade do not establish that defendant did not knowingly and voluntarily forfeit all of his property. Rather, defendant agreed to forfeit all of his assets, including some that on their face had no connection with his drug dealings – *e.g.*, "all bank accounts, investments, retirement accounts," I R. tab 210 at 3. Nothing in the agreement limits the forfeiture to those assets with an established factual basis for forfeiture. Defendant is also not limited to forfeiting only those assets directly related to the CCE conviction. Accordingly, the district court properly ordered on December 23, 1992, the forfeiture of

all of defendant's assets[8] based on defendant's written agreement and knowing and voluntary ratification of that agreement at the change of plea hearing.

III

Defendant argues that he was not advised of and did not waive his right to a jury trial on forfeiture issues. Specifically, defendant contends he did not sign a written waiver of his right to a jury trial and there was no colloquy with the court during the plea or sentencing hearing regarding his right to or waiver of a trial on forfeitability of assets.

"The Sixth Amendment never has been thought to guarantee a right to a jury determination [on punishment]." *Spaziano v. Florida*, 468 U.S. 447, 459, 104 S.Ct. 3154, 3161, 82 L.Ed.2d 340 (1984) (right to jury trial does not include right to jury determination whether to impose capital sentence). This suggests that defendant does not have a *constitutional* right to a jury trial at the forfeiture stage of these proceedings; the circuits, however, would apparently split on the issue of a constitutional right to a jury trial on forfeiture. *Compare United States v. Robinson*, 8 F.3d 418, 420 (7th Cir.1993) (noting in dicta that a

[8] Of course, defendant could only agree to forfeit assets over which he had a power of disposition. Thus, if he had an interest in a profit sharing or pension plan established by his corporate employer that was inalienable by law, or if he was beneficiary of a valid spendthrift trust created by another person, these interests would be excluded from forfeiture in the same manner as assets in defendant's possession owned by a third party.

defendant does not have a constitutional right to a jury determination on forfeiture issues, but acknowledging the right to such a determination under Fed.R.Crim.P. 31(e)) *with United States v. Garrett*, 727 F.2d 1003, 1012 & n. 6 (11th Cir.1984) (holding that a defendant has a constitutional right to a jury trial in a 21 U.S.C. § 848 proceeding to determine if an asset is forfeitable, after a jury trial as to guilt), *affirmed on other grounds*, 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985). We need not decide that issue because constitutional rights can be waived, and because a defendant does have a *statutory* right, pursuant to Fed.R.Crim.P. 31(e),[9] to have a jury determine which of his assets may be forfeited. *Robinson*, 8 F.3d at 420. Thus, we must determine whether defendant waived his right to a jury trial. "[A] defendant's waiver of his statutory right to have a jury determine which portion of his property is subject to forfeiture is only valid if knowingly and voluntarily made." *Id.* at 421. A defendant has the burden of proving that he did not exercise a valid waiver of his right. *Id.* at 422.

A valid waiver of the right to a jury trial depends on unique facts of each case. *See id.* At the plea hearing, the district court advised defendant that he could continue with the jury trial that had already started. The district court told defendant that if he pleaded guilty pursuant to the plea agreement, he would give up his right to a jury trial and would be sentenced. Defendant stated that he

[9] Rule 31(e) provides that "[i]f the indictment . . . alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture if any."

understood his rights and chose to plead guilty. *Cf. United States v. Jenkins*, 904 F.2d 549, 558-59 (10th Cir.) (at trial, defendant and his counsel have responsibility to make trial court aware of desire to testify regarding forfeiture; if no request is made, court and government can assume that evidence of guilt and forfeiture may be heard together), *cert. denied*, 498 U.S. 962, 111 S.Ct. 395, 112 L.Ed.2d 404 (1990). The district court did not specifically indicate that defendant's guilty plea negated a jury trial on any forfeiture issues. But there is no evidence at that hearing that defendant wanted a jury trial on the forfeiture issue, or thought he was going to have one. The plea agreement itself waived the right to a jury trial without specific mention of forfeiture. There is no evidence in the record that the government would have agreed to a plea agreement that settled only guilt and required a jury trial on the assets to be forfeited. We hold that specific reference to a jury trial on forfeiture issues was not necessary in light of the unambiguous plea agreement and defendant's knowing and voluntary plea. Under these circumstances we conclude defendant waived his right to a jury trial.

IV

Defendant finally argues that even if all of his assets were correctly forfeited the forfeiture order violates the Excessive Fines Clause of the Eighth Amendment. The Supreme Court has determined that forfeiture may be analyzed under the Excessive Fines Clause. *Alexander v. United States*, ___ U.S. ___, ___, 113 S.Ct. 2766, 2776, 125 L.Ed.2d 441 (1993) (criminal forfeiture under 18 U.S.C. § 1963(a)); *see also United States v. Bieri*, 21 F.3d 819, 823

n.2 (8th Cir.1994) (excessive fines analysis applies to criminal forfeiture under § 853(a)). The Court, however, has not established a test to determine when a forfeiture is excessive. *Alexander*, ___ U.S. at ___, 113 S.Ct. at 2776; *Austin v. United States*, ___ U.S. ___, ___, 113 S.Ct. 2801, 2812, 125 L.Ed.2d 488 (1993). Rather, courts must consider all factors when evaluating whether a forfeiture is unconstitutionally excessive. *Bieri*, 21 F.3d at 824 (citing *Alexander*, ___ U.S. at ___, 113 S.Ct. at 2776).

We need not decide when a forfeiture might violate the Excessive Fines Clause, because the forfeiture in this case was not excessive. *See United States v. Certain Real Property & Premises Known as 38 Whalers Cove Drive, Babylon, NY*, 954 F.2d 29, 39 (2d Cir.) (civil forfeiture), *cert. denied*, ___ U.S. ___, 113 S.Ct. 55, 121 L.Ed.2d 24 (1992). A fine of up to $2,000,000 and forfeiture are permitted for a CCE offense. 21 U.S.C. § 848(a); U.S.S.G. § 5E1.2(c)(3), (4). Defendant was fined only $5,000. The plea agreement stated that property up to $1,500,000 could be forfeited; yet the actual value of the property forfeited was only $410,000. The forfeiture order did not violate the Excessive Fines Clause of the Eighth Amendment.

V

Defendant raises several other arguments in his pro se briefs, mostly related to the issues determined above. These arguments are not sufficiently meritorious to warrant their being specifically addressed.

The order of forfeiture is AFFIRMED. The government's motion to dismiss is DENIED. Defendant's motion for limited remand is DENIED as moot.

Supreme Court of the United States

No. 94-7427

Joseph Libretti,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 27, 1995

(6)

No. 94-7427

In The

Supreme Court of the United States

October Term, 1995

JOSEPH V. LIBRETTI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR THE PETITIONER

Of Counsel:
PAUL K. SUN, JR.
SMITH HELMS MULLISS
& MOORE, L.L.P.
316 West Edenton Street
Post Office Box 27525
Raleigh, North Carolina
27611
Telephone: 919-755-8720

SARA SUN BEALE
(Appointed by this Court)
Counsel of Record
Duke University School
of Law
Science Drive & Towerview
Road
Post Office Box 90360
Durham, North Carolina
27708-0360
Telephone: 919-613-7091
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RECEIVED
JUL 11 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. Whether Rule 11(f) of the Federal Rules of Criminal Procedure requires the district court to determine if there is a factual basis for a defendant's plea to a criminal forfeiture charged in an indictment or information.

2. Whether a defendant who pleads guilty waives the right to a special verdict on forfeiture under Rule 31(e) of the Federal Rules of Criminal Procedure and the Sixth Amendment when the defendant was not advised of this right and never explicitly waived it.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT 1

The Indictment 2

The Plea Agreement and the Rule 11 Hearing 3

The plea agreement 3

The Rule 11 hearing 4

Sentencing 5

The Entry of Judgment and the Notice of Appeal ... 6

The Post-Trial Proceedings in the District Court 6

The third-party claims 6

The government's case 7

Petitioner's claims 8

The Court of Appeals 9

SUMMARY OF ARGUMENT 10

ARGUMENT 14

TABLE OF CONTENTS – Continued

Page

I. RULE 11(f) REQUIRES THE DISTRICT COURT TO SATISFY ITSELF THAT THERE IS A FACTUAL BASIS FOR THE FORFEITURE COMPONENT OF A GUILTY PLEA 14

A. Rule 11(f) Requires an Inquiry Into the Factual Basis for the Elements of the Offense to Ensure that Each Plea is Knowing, Intelligent, and Voluntary 14

B. Because the Federal Rules of Criminal Procedure Treat Forfeiture as an Element of Criminal Liability, Rule 11(f) Requries an Inquiry Into the Factual Basis for the Forfeiture Component of a Guilty Plea 15

1. The Federal Rules of Criminal Procedure treat criminal forfeiture as an element of criminal liability 15

2. Rule 11(f) requires the court to satisfy itself that there is a factual basis when a defendant's plea includes forfeiture 20

C. An Inquiry Into the Factual Basis for Forfeiture is Necessary to Determine Whether a Plea is Knowing and Intelligent 21

II. REQUIRING A FACTUAL BASIS IS NECESSARY TO ENSURE THAT CRIMINAL FORFEITURE DOES NOT EXCEED ITS STATUTORY MANDATE 26

A. Section 853 Authorizes Forfeiture for Only a Limited Class of Tainted Assets 26

TABLE OF CONTENTS – Continued

Page

B. Procedural Safeguards are Necessary to Ensure that Forfeiture Does Not Exceed the Limits Set by Congress as a Result of Governmental Overreaching or Simple Mistake. 27

C. If No Factual Basis is Required, the Prosecution May Use the Plea Process to Work a Forfeiture of Estate Rather than the Statutorily Authorized Forfeiture of Tainted Assets. 31

D. In Light of the Disparity in Bargaining Power Between the Government and the Defendant, the Defendant's Agreement to Forfeiture Provides No Real Assurance that It Meets the Criteria of Section 853. 33

III. A FACTUAL BASIS INQUIRY IS NECESSARY TO PROVIDE SOME MEASURE OF PROTECTION TO THIRD PARTIES WHOSE INTERESTS MAY BE AFFECTED BY FORFEITURES OBTAINED PURSUANT TO PLEA AGREEMENTS. 34

A. Third Parties Are Deprived of Important Procedural Rights in the Ancillary Hearing Afforded Under 21 U.S.C. § 853(n)..... 35

B. The Interests of Some Third Parties May Be Extinguished Without Recourse as a Result of Criminal Forfeiture..... 36

TABLE OF CONTENTS – Continued

Page

C. In the Instant Case the Property Rights of Third Parties Were Prejudiced By Entry of the Forfeiture Order Pursuant to Petitioner's Plea Agreement..... 37

D. Congress Did Not Intend for the Interests of Third Parties to be Disturbed By Criminal Forfeiture Unless the Government First Established a Reliable Basis for the Forfeiture. 38

IV. THE DISTRICT COURT'S FAILURE TO CONDUCT A FACTUAL BASIS INQUIRY INTO THE FORFEITURE COMPONENT OF PETITIONER'S PLEA VIOLATED PETITIONER'S SUBSTANTIAL RIGHTS..... 39

V. BOTH RULE 31(e) AND THE SIXTH AMENDMENT AFFORD A RIGHT TO JURY TRIAL ON THE NATURE AND EXTENT OF ANY PROPERTY SUBJECT TO FORFEITURE IN A CRIMINAL PROCEEDING. 41

A. At Common Law the Issue of Criminal Forfeiture Was Submitted to the Jury. ... 42

B. The Sixth Amendment Incorporates the Common Law Right to a Jury Determination of the Property Subject to Criminal Forfeiture..... 44

C. Rule 31(e) Supplements the Sixth Amendment By Requiring a Special Jury Verdict on the Nature and Extent of Property Subject to Criminal Forfeiture..... 45

TABLE OF CONTENTS – Continued

Page

VI. THE RIGHT TO A JURY DETERMINATION OF CRIMINAL FORFEITURE CAN BE EXTINGUISHED ONLY BY A KNOWING AND INTELLIGENT WAIVER. 46

A. The Waiver of the Sixth Amendment Right to Trial By Jury Must Constitute the Intentional and Intelligent Relinquishment of a Known Right. 46

B. The Waiver of the Right to a Special Verdict Under Rule 31(e) Must Be the Express and Intelligent Relinquishment of a Known Right. 47

C. Neither the Plea Agreement Nor the Court's Comments Informed Petitioner of His Right to a Jury Trial and Special Verdict on Forfeiture, and Petitioner Made No Knowing and Intelligent Waiver of this Right. 48

CONCLUSION 50

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) 46

Austin v. United States, 113 S. Ct. 2801 (1993) 17

Boykin v. Alabama, 395 U.S. 238 (1969) 40

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) 19

C.J. Hendry Co. v. Moore, 318 U.S. 133 (1943) 35

Duncan v. Louisiana, 391 U.S. 145 (1968) 44

Greene v. Briggs, 10 F. Cas. 1135 (C.C. D. R.I. 1852) (No. 5,764) 44

Harmelin v. Michigan, 501 U.S. 957 (1991) 28

Johnson v. Louisiana, 406 U.S. 366 (1972) 44

Johnson v. Zerbst, 304 U.S. 458 (1938) 46

McCarthy v. United States, 394 U.S. 459 (1969) 15, 40

Missouri v. Hunter, 459 U.S. 359 (1983) 27

Mistretta v. United States, 488 U.S. 361 (1989) 27

North Carolina v. Alford, 400 U.S. 25 (1970) 14, 15

Schiavone v. Fortune, 477 U.S. 21 (1986) 17

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 47

The J.W. French, 13 F. 916 (E.D. Va. 1882) 35

Tome v. United States, 115 S. Ct. 696 (1995) 17

Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988) 17

TABLE OF AUTHORITIES – Continued

Page

United States v. A Parcel of Land, Bldgs., Appurtenances and Improvements, Known as 92 Buena Vista Ave., Rumson, N.J., 113 S. Ct. 1126 (1993) 38

United States v. De Ortiz, 910 F.2d 376 (7th Cir. 1990) 35

United States v. Elgersma, 971 F.2d 690 (11th Cir. 1992) 18, 20

United States v. Feldman, 853 F.2d 648 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989) 21

United States v. Garrett, 727 F.2d 1003 (11th Cir. 1984), *aff'd*, 471 U.S. 773 (1985) 47

United States v. Grande, 620 F.2d 1026 (4th Cir.), *cert. denied*, 449 U.S. 919 (1980) 29, 31

United States v. Hernandez-Escarsega, 886 F.2d 1560 (9th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990) 18, 20

United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) 27

United States v. Jenkins, 904 F.2d 549 (10th Cir.), *cert. denied*, 498 U.S. 962 (1990) 21

United States v. McKeithen, 822 F.2d 310 (2d Cir. 1987) 21, 49

United States v. One 1976 Mercedes-Benz 280S, 618 F.2d 453 (7th Cir. 1980) 35

TABLE OF AUTHORITIES – Continued

Page

United States v. Roberts, 749 F.2d 404 (7th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985) 31

United States v. Robinson, 8 F.3d 418 (7th Cir. 1993) 48

United States v. Sandini, 816 F.2d 869 (3rd Cir. 1987) 21

United States v. Sells Engineering, Inc., 463 U.S. 418 (1983) 17

Williams v. Florida, 399 U.S. 78 (1970) 45

Whalen v. United States, 445 U.S. 684 (1980) 27

CONSTITUTION:

United States Constitution, Art. III, Sec. 3, Cl. 2 ...29, 31

United States Constitution, Amend. VI ..... *passim*

STATUTES AND REGULATIONS:

Act of Oct. 27, 1986, Pub. L. No. 99-570, § 1153, 100 Stat. 3207, 3207-13 31

Act of Oct. 12, 1984, Pub. L. No. 98-473 § 212(a)(2), 98 Stat. 1837, 1987 30

§ 302, 98 Stat. 1837, 2040 30

§ 303, 98 Stat. 1837, 2044-45 31

Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408(a), 84 Stat. 1236, 1265-66 ..... 16, 30-31

Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 943 ..... 15, 30

Act for the Punishment of Certain Crimes Against the United States, Statute 2, ch. 9, § 24, 1 Stat. 112 30

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 922 2

18 U.S.C. § 924 2

18 U.S.C. § 1503 2

18 U.S.C. § 1952 2

18 U.S.C. § 1956 2

18 U.S.C. § 1963 ..... 15-16, 35

18 U.S.C. § 3563 30

18 U.S.C. App., Notes of Advisory Committee on Rules 47

18 U.S.C. App., Notes of Advisory Committee on Rules – 1966 Amendment 15, 25

18 U.S.C. App., Notes of Advisory Committee on Rules – 1972 Amendment 16, 18, 45

18 U.S.C. App., Notes of Advisory Committee on Rules – 1979 Amendment 19

18 U.S.C. App., Notes of Advisory Committee on Rules – 1983 Amendment 40

Notes of Advisory Committee on Rules – 1994 Amendment 19

19 U.S.C. § 1615 35

21 U.S.C. § 841 2

21 U.S.C. § 846 2

21 U.S.C. § 848 ..... 2, 3, 16, 31

21 U.S.C. § 853 ..... *passim*

21 U.S.C. § 853(a) 1, 17, 26

TABLE OF AUTHORITIES – Continued

Page

21 U.S.C. § 853(d) 20, 41

21 U.S.C. § 853(n) 1, 35, 36, 39

21 U.S.C. § 853(p) 1, 26

21 U.S.C. § 854 2

21 U.S.C. § 881 ..... 17, 35, 38

28 U.S.C. § 1254 1

Fed. R. Crim. P. 7 ..... *passim*

Fed. R. Crim. P. 7(c)(2) ..... *passim*

Fed. R. Crim. P. 11 ..... *passim*

Fed. R. Crim. P. 11(c)(1) 24

Fed. R. Crim. P. 11(c)(4) 48

Fed. R. Crim. P. 11(f) ..... *passim*

Fed. R. Crim. P. 11(h) 40

Fed. R. Crim. P. 23 1

Fed. R. Crim. P. 23(a) 13, 47, 48

Fed. R. Crim. P. 31 ..... 1, 11, 16

Fed. R. Crim. P. 31(e) ..... *passim*

Fed. R. Crim. P. 32 ..... 1, 11, 16, 19, 45

Fed. R. Crim. P. 32(b) 19

Fed. R. Crim. P. 32(d) 19, 20

Fed. R. Crim. P. 54 ..... 1, 16

Amendments to the Federal Rules of Criminal Procedure, 56 F.R.D. 143 (1972) 18, 19

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

Annual Report of the Department of Justice Asset Forfeiture Office Fiscal Year 1993 28

Lisa Belkin, *The Booty of Drugs Enriches Agencies*, N.Y. Times, Jan. 7, 1990, at A18, col. 1 28

4 William Blackstone, *Commentaries* (reprinted Dennis & Co. 1965) (St. George Tucker ed., Phila. 1803) 29, 43

Michael P.A. Cohen, Note, *The Constitutional Infirmity of RICO Forfeiture*, 46 Wash. & Lee L. Rev. 937 (1989) 29

Thomas Dogherty, *The Crown Circuit Companion* (1799) 42, 43

Julius Goebel & T. Raymond Naughton, *Law Enforcement in Colonial New York* (1944) 43

1 Matthew Hale, *History of the Pleas of the Crown* (1778 ed.) 42

2 William Hawkins, *Pleas of the Crown 1716-21* (1721 ed.) 43

3 William S. Holdsworth, *A History of English Law* (3d ed. 1927) 29

James R. Maxeiner, Note, *Bane of American Forfeiture Law – Banished at Last?*, 62 Cornell L. Rev. 786 (1977) 30

5 J. Moore, *Federal Practice Digest* (2d ed. 1987) 35

TABLE OF AUTHORITIES – Continued

Page

1 Frederick Pollock & Frederic W. Maitland, *The History of English Law* (2d ed. 1898) 29

Memorandum from Frank J. Remington, Reporter, To Advisory Committee on Federal Rules of Criminal Procedure (Aug. 6, 1971), *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-88, CM-4115-71 (Congressional Information Service) 16

2 David B. Smith, *Prosecution and Defense of Forfeiture Cases* (1992) 35

3 Joseph Story, *Commentaries on the Constitution of the United States* (reprinted Fred B. Rothman & Co. 1991) (Boston 1833) 29

Nathaniel C. Towle, *A History and Analysis of the Constitution of the United States* (reprinted Fred B. Rothman & Co. 1987) (3d ed. Boston 1871) 29

The Office of the Clerk of Assize and The Office of the Clerk of the Peace (1676), microformed on Wing, *Early English Books*, 1641-1700, reel 829 ..... 42, 43

S. Rep. No. 225, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 3182, 3392 39

S. Rep. No. 613, 91st Cong., 1st Sess. (1969) 31

S. Rep. No. 617, 91st Cong., 1st Sess. (1969) .. 16, 30, 31

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (J.A. 313) is reported at 33 F.3d 523. The order of the district court for the District of Wyoming (J.A. 155) is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on October 19, 1994. J.A. 313. The petition for a writ of certiorari was filed on December 27, 1994, and was granted on March 27, 1995. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Rule 11(f) of the Federal Rules of Criminal Procedure provides:

> (f). Determining the Accuracy of the Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

The Sixth Amendment of the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law * * * .

The pertinent portions of Rules 7, 11, 23, 31, 32, and 54 of the Federal Rules of Criminal Procedure, and 21 U.S.C. § 853(a), (n) and (p) are reprinted *infra* at App. 1-6.

STATEMENT

The district court accepted petitioner's guilty plea to the continuing criminal enterprise (CCE) count of a multicount

indictment. The plea was based upon a plea agreement that included a forfeiture provision. At sentencing the court rejected petitioner's objection that the government had not shown a factual basis for the forfeiture. Petitioner appealed from the forfeiture order, and also reiterated his objections in the district court. The district court amended its forfeiture order, holding that a fact-finding hearing would be necessary to determine whether all of the assets covered in the order were subject to forfeiture. This order was stayed pending the appeal. The court of appeals concluded that the district court lost jurisdiction once the notice of appeal was filed, and the appeals court affirmed the original forfeiture order.

The Indictment

On May 22, 1992, the grand jury in the district of Wyoming returned an eleven-count superseding indictment charging petitioner with drug, weapons, and money-laundering offenses. J.A. 38-71. Count 6 of the indictment,[1] to which petitioner ultimately pleaded guilty, charged that from 1984 to 1992 petitioner engaged in a continuing criminal enterprise. J.A. 56-63; *see* 21 U.S.C. § 848. The indictment charged that petitioner operated a cocaine and marijuana distribution organization in Wyoming and Colorado, and that he used his federal firearms license to launder drug proceeds by purchasing firearms.

Count 6 called for the forfeiture of "all property of any kind constituting or derived from proceeds" petitioner obtained by engaging in the CCE, and "all property of any

[1] The other charges were conspiracy to possess cocaine and marijuana with intent to distribute in violation of 21 U.S.C. § 846 (Count 1); use of firearms in relation to a drug trafficking felony in violation of 18 U.S.C. § 924(c) (Count 2); interstate travel to facilitate drug dealing in violation of 18 U.S.C. § 1952(a)(3) (Count 3); unlawful possession of a machine gun in violation of 18 U.S.C. § 922(o)(1) (Count (4); using drug proceeds to operate a business in violation of 21 U.S.C. § 854 (Count 5); money laundering in violation of 18 U.S.C. § 1956(a)(B)(i) (Counts 7 & 8); obstruction of justice in violation of 18 U.S.C. § 1503 (Counts 9 & 10); and possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(A)(1). J.A. 38-71.

kind" used or intended for use to facilitate the enterprise, including but not limited to the following: a parcel of land in Star Valley, Wyoming; a car and a truck; $102,360 in currency allegedly received in exchange for controlled substances and spent or disposed of; $7,635 petitioner sent to Dee Smith; $12,000 in cash that had been stored in petitioner's home; all currency and travelers' checks recovered from petitioner's person, office, home, gun safes, or lockers; a diamond ring and wedding band; a mobile home; a computer; two GNMA certificates; an investment account holding municipal bonds; three cashier's checks totaling $3,682; and the contents of two safe deposit boxes. J.A. 64-67.

The Plea Agreement and the Rule 11 Hearing

After several days of trial, on October 5, 1992, petitioner appeared before the district court to enter a guilty plea. J.A. 84.

The plea agreement

The plea agreement included petitioner's agreement to plead guilty to a CCE under Count 6, and the government's agreement to recommend at sentencing that petitioner receive not more than the mandatory minimum sentence of 20 years required by 21 U.S.C. § 848. J.A. 79-80.[2]

Paragraphs 2, 9, and 10 dealt with forfeiture. With regard to forfeiture, paragraph 2 of the agreement stated (J.A. 79):

> The maximum statutory penalty for the offense is life imprisonment, not more than a $2,000,000 fine, or both, a $50 mandatory special assessment, and forfeiture of all known assets as prescribed in 21 U.S.C. § 853 and assets which are discovered at any later time up to $1,500,000.

Paragraph 9 stated (*id.*) that petitioner agreed to "identify all assets that were used to facilitate his criminal activity," and to

[2] The agreement also recited petitioner's acknowledgment that he had read the agreement and the indictment, that the charges had been fully explained to him by his attorney, and that he understood the nature and elements of the offenses with which he was charged and the maximum and minimum penalties. J.A. 80.

"provide complete financial disclosure forms requiring the listing of assets and financial interests." Paragraph 10 stated (J.A. 81) that petitioner agreed

> to transfer his right, title, and interest in all of his assets to the Division of Criminal Investigation of the Wyoming Attorney General including, but not limited to: all real estate; all personal property, including guns, the computer, and every other item now in the possession of the United States; all bank accounts, investments, retirement accounts, cash, cashier's checks, travelers [sic] checks and funds of any kind.

The Rule 11 hearing

The district court advised petitioner of the various procedural rights he would be waiving. The court stated (J.A. 87):

> Now, if you plead guilty, it's going to be the end of this trial. We're not going to go through with this until the end of this week, or next weeks [sic], and the jury is not going to decide whether you're guilty or not. I'll dismiss them after this, and that will be that.

In describing the maximum and minimum sentences, the court advised that in addition to the mandatory sentence of imprisonment, "all the property that's described in this Count 6 could be forfeited to the United States." J.A. 88.

In response to the question whether he understood the consequences of the agreement, petitioner asked whether the statement that the government could forfeit "one and a half million dollars from me any time," meant that even a salary earned twenty years in the future might be forfeited. J.A. 88. The court responded that later-acquired property that was not drug-tainted would not be forfeited, but if drug-tainted property came to light later, it would be forfeited. J.A. 89. After that exchange, the court again asked petitioner if he understood his rights, and petitioner replied that he did. J.A. 90. The court then read Count 6, including the forfeiture allegations, and petitioner stated that he understood it. J.A. 90-98.

Petitioner acknowledged that he had read the plea agreement and said that he understood it. J.A. 98. After petitioner was placed under oath, the court asked (J.A. 100):

> Do you understand that all of your property could be forfeited, the property that is owned by you by reason of any drug transaction?

Petitioner responded in the affirmative. *Id.*

Petitioner stated that he was pleading guilty because of the strength of the government's case, and because of a desire to relieve family members of the need to testify. J.A. 101-02, 119-20. Upon determining that petitioner admitted that he was guilty of some of the incidents related in Count 6 but not others, the court reviewed each allegation in that count with petitioner. J.A. 102-119. While petitioner disagreed with many of the amounts and dates for the transactions listed in paragraphs 1-26 of Count 6, the court summarized this discussion with the comment that petitioner agreed the charge was "substantially true except for the details" noted. J.A. 118.

The court then accepted the plea, finding it was voluntary and supported by a factual basis, and approved the plea agreement. J.A. 121.

Sentencing

Petitioner appeared for sentencing on December 23, 1992. J.A. 136. The court sentenced petitioner to twenty years of imprisonment, five years of supervised release, a $5,000 fine, a $50 special assessment, and 500 hours of community service. J.A. 165-70. On motion of the United States, the court granted an order of forfeiture. The court stated (J.A. 150), "I think that I have no alternative but to grant the forfeiture order and it is hereby granted."

When the court wished petitioner good luck and remanded him to the marshal, petitioner asked, "Are we over?" J.A. 153-54. When the court replied "I think so,' petitioner responded, "I would just like to object to what I see as a failure to find any factual basis for the whole forfeiture, just for the record." J.A. 154. The court noted the objection and stated that "the evidence that I heard before me in the two

days of trial I think is sufficient to warrant the granting of forfeiture. I think I have no alternative." *Id.*

The Entry of Judgment and the Notice of Appeal

The court entered the forfeiture order and the judgment of conviction on December 23, 1992. J.A. 155-164, 165-70. On December 29, 1992, petitioner filed a notice of appeal from the forfeiture order. J.A. 3.

The Post-Trial Proceedings in the District Court

1. The district court held the first hearing on third-party claims to forfeited property on February 9, 1993. J.A. 173-83. At the beginning of the hearing the government raised the question whether a condominium included in the forfeiture order could be sold immediately, with the consent of the co-owner, to prevent foreclosure. J.A. 173. The court asked petitioner whether he had any objections, and petitioner objected that the condominium should not have been included in the forfeiture order because it was not the proceeds of any drug offense. J.A. 174-75. The court allowed the sale, provided that the proceeds be retained to permit petitioner to assert any claims he might have. J.A. 176. The court then deferred consideration of other claims until additional notice had been given.

2. On March 26, 1993, the district court held a second hearing on third-party claims and also heard petitioner's claims. J.A. 184-297.

The third-party claims

Third-party claimant Claudia Porter stated that in 1990 she received a diamond engagement ring from petitioner. J.A. 184. The court found that the ring had been purchased with legitimate funds, and that Porter was an innocent owner. J.A. 306.

Beverly Libretti, petitioner's mother, appeared representing herself and her husband. She asserted claims to two bank accounts that had been owned jointly by petitioner and his parents. J.A. 187-204. She stated that one account was opened

when her son was a small child, and that it held his birthday, confirmation, and allowance money. J.A. 188-89. The last deposit in this account was made in 1975. J.A. 198-99. They opened the second account in another bank when her son was in high school, so that he could ride his bike there to make deposits. J.A. 189. The last deposit in this account was made in 1981. J.A. 201-02. The court found that the proceeds in these accounts were not traceable to drug transactions, and that they should be returned to petitioner's parents, who were joint tenants with a right of survivorship. J.A. 307-08.

Mrs. Libretti also made a claim to a parcel of real estate in Star Valley, Wyoming, which her son had deeded to his father in return for the moneys his parents paid for his defense. J.A. 190-91, 194-97. She stated that she and her husband were aware of their son's legitimate sources of income from his employment, that they knew nothing about any drug transactions before the charges in this case were filed, and that they had no knowledge that any drug proceeds might have been used to purchase this land. J.A. 191. She acknowledged that she and her husband had not purchased the land from their son, but stated that petitioner had intended it as payment for the money they had provided for his defense. J.A. 190-91, 195. The court reserved ruling on this claim. J.A. 307.

The government's case

Tony Young, a special agent for the Wyoming Attorney General, testified for the government. J.A. 204-251. Agent Young testified to various expenditures by petitioner over a period of years in excess of his reported income (J.A. 204-11), to interviews with codefendants who described petitioner's cocaine purchases and storage of cash (J.A. 212), to conversations with Claudia Porter in which she reported seeing petitioner with large sums of money that she later believed to be drug proceeds (J.A. 213-17, 220-22), and to petitioner's use of safe deposit boxes to store moneys related to drug trafficking (J.A. 223-29). Based on his estimates of the quantity of drugs involved and the financial records he examined, Young estimated that from 1981 to 1991 petitioner

had drug-trafficking profits of one million dollars or more. J.A. 237-38.

Petitioner's claims

Petitioner sought to show that he had substantial non-tainted funds, and that the government had seized both tainted and nontainted property. For example, petitioner testified that only a small fraction of the moneys in his Wyochem account were drug moneys, and that there were sufficient legitimate funds from his employment to cover the check he wrote on that account to purchase the Star Valley lot. J.A. 265-67. Petitioner testified that his salary from General Chemical, where he was employed as an accounting supervisor, was $48,775 in 1989 and increased to $53,000 by 1991. J.A. 262-64. Petitioner's lack of access to his financial records prior to the hearing and the court's refusal to allow him to subpoena witnesses hampered this presentation. *See* J.A. 265-66, 270, 276-77, 283, 294-95.

The court stated that it was "convinced" by petitioner's presentation, and would remand the case to a magistrate judge for a determination whether the property the government was forfeiting was "tainted or not." J.A. 281. The court ordered that petitioner could subpoena the necessary information, and that his prior counsel, who had his financial records, should deliver those to him immediately. J.A. 284.

On April 2, 1993, the court entered an order amending its December 23 forfeiture order in accordance with the conclusions reached at the March 26 hearing. J.A. 298-312. The order stated the court's determination "that it may be unjust to enforce the specific forfeiture provisions of the plea agreement," "[s]ince forfeiture statutes do not mandate forfeiture of property purchased with legitimate funds." J.A. 309. The court also observed that "a defendant's concession in a plea agreement to the forfeiture of his property 'does not make it so.' " *Id.* (citations omitted). Accordingly, the court ordered the magistrate judge to hold a fact-finding hearing at which petitioner would have the burden of proving by a preponderance that his property is not subject to forfeiture. J.A. 310.

The district court later granted the government's motion to stay the fact-finding hearing pending the appeal. J.A. 317.

The Court of Appeals[3]

The court of appeals first concluded (J.A. 317-19) that the district court's actions subsequent to the filing of the notice of appeal had not deprived the appellate court of its jurisdiction. The court of appeals held that the district court had no jurisdiction to consider the petitioner's claims once he had filed a notice of appeal from a final judgment. J.A. 318-19.

On the merits, the court of appeals held that the district court is not required to find a factual basis for forfeiture under Fed. R. Crim. P. 11(f). J.A. 321-23. The court reasoned that forfeiture under 21 U.S.C. § 853 is a part of the sentence, not a part of the substantive offense. J.A. 322. Therefore, the forfeiture provision was a sanction to which the parties had agreed as a consequence of petitioner's plea, not a plea to a substantive charge. *Id.*

Noting that a lawful plea agreement is enforceable, the court concluded that petitioner was bound by the terms of his plea agreement. J.A. 322-26. The court rejected petitioner's claim that the plea agreement was vague and ambiguous, and that he did not knowingly and voluntarily agree to forfeit all of his property. J.A. 323-26. The court stated that the district court had thoroughly assessed whether petitioner understood the consequences of his plea, and that petitioner had received a favorable plea bargain. J.A. 324-25. The court found "[n]othing in the record" to suggest that petitioner's plea would have been different if he had been questioned further about the forfeitability of his assets. J.A. 324.

The court recognized that the district court had made some statements at the Rule 11 hearing that suggested a narrower scope for the forfeiture. In particular, the district court had made "statements that defendant was only forfeiting

---

[3] Petitioner filed several pro se notices of appeal. In addition to the present appeal challenging the forfeiture order (No. 93-8000), he appealed the fine and community service ordered by the district court (No. 93-8001), and the April 2, 1993 ruling, which, *inter alia*, ordered further fact-finding on the forfeiture issues but denied petitioner's post-sentence motions for return of property and denied a stay of execution of the forfeiture order (No. 93-8029).

assets listed in the CCE count of the indictment or from his drug trade." J.A. 325. The court of appeals characterized these statements by the district judge as "extraneous" and concluded that they failed to establish that petitioner had not knowingly and voluntarily agreed to forfeit all of his assets. *Id.* This part of the court's opinion makes no reference to petitioner's objection at the sentencing hearing to the lack of a factual basis for the forfeiture order.

The court of appeals also rejected petitioner's claim that he was not advised of and did not waive his right to a jury trial on the forfeiture issues. J.A. 326-28. The court found it unnecessary to decide whether there is a constitutional right to a jury trial on forfeiture issues because petitioner had a statutory right to a jury determination under Fed. R. Crim. P. 31(e). J.A. 327. The court concluded that petitioner knowingly and voluntarily waived this right. J.A. 327-28. The court recognized that petitioner had not been specifically advised that he would be waiving his right to a jury trial on the forfeiture issues if he pleaded guilty, but it concluded that no specific reference was necessary "in light of the unambiguous plea agreement and defendant's knowing and voluntary plea." J.A. 328.

SUMMARY OF ARGUMENT

1. When a defendant pleads guilty, Rule 11(f) of the Federal Rules of Criminal Procedure requires the court to "satisfy itself that there is a factual basis for the plea" before the entry of judgment. If the case involves criminal forfeiture, Rule 11(f) should require a factual basis for both components of the plea: (1) the defendant's admission that he committed an offense charged in the indictment, and (2) the defendant's admission that some or all of the property named in the indictment is subject to forfeiture.

Requiring a factual basis for the forfeiture component of the plea is necessary to carry out the core function of Rule 11: assuring that the plea is knowing, intelligent, and voluntary. If the court finds that there is no factual basis for the forfeiture to which a defendant has agreed, this is a strong indication

that his plea is not knowing and intelligent. In such a case, the defendant may not have understood that neither what he has admitted nor what the government can prove would establish a basis for forfeiture, and he may have agreed to the forfeiture because of this fundamental misunderstanding.

The factual basis inquiry should also bring to light any misunderstanding by the defendant regarding the scope of the forfeiture to which he has agreed. A plea is not knowing and intelligent unless a defendant understands the direct consequences of his plea, and criminal forfeiture is one of the most significant direct consequences of the plea. That is certainly the case here, where the plea agreement has been interpreted as allowing forfeiture of *all of the defendant's property*, including substantial legitimate income and other admittedly untainted property.

A factual basis inquiry under Rule 11(f) is also a necessary correlative to Rules 7, 31, and 32 of the Federal Rules of Criminal Procedure, which establish the procedural framework for criminal forfeiture. These rules require that criminal forfeiture be charged in the indictment, found by the jury in a special verdict, and recorded in a judgment of forfeiture. These rules reflect a decision to treat forfeiture as a substantive charge or element of criminal liability, not merely as a matter of sentencing. Indeed the Criminal Rules Advisory Committee rejected a draft that would have treated forfeiture as a matter to be dealt with by the judge at sentencing, adopting instead the common law practice of providing the defendant with notice in the indictment and a special jury verdict. Given the heightened procedural safeguards for criminal forfeiture, including the requirement of a special jury verdict, Rule 11(f) should be interpreted to require the court to assure itself that there is at least a factual basis for a plea to a forfeiture charge. That logic applies with special force where, as here, the government seeks to forfeit *all of* the defendant's assets, including substantial assets that were legitimately acquired.

Finally, requiring a showing of a factual basis under Rule 11(f) is necessary to ensure that criminal forfeiture does not exceed the limitations established by Congress. Federal law

does not authorize forfeiture of estate. Forfeiture is statutorily authorized only where the prosecution can prove a connection between the assets sought to be forfeited and the underlying offense. This is true even in the case of substitute assets, which may be forfeited only upon a showing that there were tainted assets and a further showing that those tainted assets cannot be reached by the forfeiture order. Unless the government can establish that it is a substitute asset, property that has no connection with the offense is not subject to forfeiture under federal law. The factual basis inquiry will provide some assurance that this limitation is observed in guilty plea cases.

This assurance is sorely needed. History teaches that the government may abuse forfeiture authority. The severe sentences under the federal drug laws give the prosecution enormous leverage, and there is a real danger that federal prosecutors will employ their charging and bargaining authority to pressure defendants to give up their right to property that is not forfeitable under federal law. Interpreting Rule 11(f) to require a factual basis inquiry will deter prosecutorial efforts to forfeit property for which there is no statutory mandate. The factual basis inquiry will also provide a degree of protection for third parties whose rights may be adversely affected by entry of a forfeiture order pursuant to a plea agreement.

2. Rule 31(e) of the Federal Rules of Criminal Procedure requires a special jury verdict on "the extent of the interest subject to forfeiture, if any." This rule stands on both a common law and a constitutional foundation, and any waiver of this right must be the intentional relinquishment of a known right.

The historical record demonstrates that at common law in England and the American colonies the question of the nature and extent of property subject to forfeiture was submitted to the petit jury. The legislative history of Rule 31(e) reveals that the Rules Advisory Committee intended the special jury verdict provision to adopt the common law procedure.

Rule 31(e) also stands on a constitutional foundation. This Court's decisions teach that the Sixth Amendment guarantees a jury trial in cases where it would have been available

at common law, and explain that the purpose of the right is to prevent government oppression and to provide a safeguard against a corrupt or overzealous prosecutor. Given the common law tradition of submitting the issue of forfeiture to the petit jury and the potential for governmental abuse of forfeiture, the right to a jury trial on forfeiture must be guaranteed under the Sixth Amendment.

A waiver of the constitutional and statutory right to a jury trial on criminal forfeiture must be knowing and intelligent, and should be explicit as well. This Court's prior decisions require that the waiver of the Sixth Amendment right to trial by jury be knowing and intelligent. Rule 23(a) of the Federal Rules of Criminal Procedure implements the constitutional standard for waiver, requiring that the defendant personally waive the right to a jury trial in writing.

Whether judged by constitutional standards or by Rule 23(a), the waiver of the right to a jury trial and special verdict on forfeiture under Rule 31(e) must be knowing and intelligent. This standard is not met merely because a defendant has tendered a guilty plea. A plea of guilty does not necessarily waive the right to have a jury determine the issue of forfeiture. To the contrary, the lower courts have recognized that a defendant may enter a plea of guilty but insist on a trial of the forfeiture issue to the jury, just as he might plead guilty on one count but go to trial on another.

Nor is it sufficient for the defendant to make a general waiver of the right to a jury trial if he was not aware of his right to have a jury determine what property, if any, would be subject to forfeiture. Absent some evidence that the defendant was advised of his rights under Rule 31(e) and the Sixth Amendment, the defendant's statement that he waives his "right to a jury trial" does not establish a knowing waiver of the right to have a jury determine the issue of forfeiture. This is particularly true where, as here, the court specifically advises the defendant that pleading guilty means that the jury will not decide the issue of guilt or innocence.

Absent evidence of the defendant's awareness of the right to a jury determination of the extent of any property subject to forfeiture, any purported waiver could not be knowing or

intelligent. In the absence of such a valid waiver, a judgment of forfeiture is invalid.

ARGUMENT

I. RULE 11(f) REQUIRES THE DISTRICT COURT TO SATISFY ITSELF THAT THERE IS A FACTUAL BASIS FOR THE FORFEITURE COMPONENT OF A GUILTY PLEA.

Fed. R. Crim. P. 11(f) provides that a court that has accepted a guilty plea shall not enter judgment "without making such inquiry as shall satisfy it that there is a factual basis *for the plea*." (Emphasis added). The question in this case is whether forfeiture is included in "the plea" as that term is used in Rule 11(f). On its face, the unqualified language of Rule 11(f) reaches both components of petitioner's plea: (1) his admission that he committed an offense charged in the indictment, and (2) his admission that the property named in the indictment was subject to forfeiture. *Cf. North Carolina v. Alford*, 400 U.S. 25, 32 (1970) (recognizing that a guilty plea is typically composed of two elements, the defendant's admission that he committed the offense charged and his consent that judgment be entered without a trial of any kind).

A. Rule 11(f) Requires an Inquiry Into the Factual Basis for the Elements of the Offense to Ensure that Each Plea is Knowing, Intelligent, and Voluntary.

Rule 11(f) is an important part of the set of procedures designed to ensure that a defendant like petitioner who enters a guilty plea does so knowingly, intelligently, and voluntarily. The Advisory Committee Notes to Rule 11(f) specifically state that the principal purpose of the factual basis requirement is to bring to light cases in which the defendant's plea is not knowing and intelligent. As the Notes explain:

> [The factual basis] inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.

18 U.S.C. App., Notes of Advisory Committee on Rules – 1966 Amendment. The Notes also state that the district court should satisfy itself "that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty." *Id.* The factual basis requirement thus supplements other provisions of the 1966 amendments, which require the court to address the defendant personally and determine that the plea is knowing and voluntary. *See id.*

This Court has recognized the vital role the factual basis inquiry plays in ensuring that pleas are knowing and voluntary. In *North Carolina v. Alford*, 400 U.S. at 38, this Court stated that the evidence of the defendant's guilt "provided a means by which the judge could test whether the plea was being intelligently entered." Similarly, in *McCarthy v. United States*, 394 U.S. 459, 465 (1969) (footnote omitted), which involved multiple Rule 11 violations including the failure to inquire into the factual basis for the defendant's plea, this Court explained that the Rule 11 procedure "is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary."

B. Because the Federal Rules of Criminal Procedure Treat Forfeiture as an Element of Criminal Liability, Rule 11(f) Requires an Inquiry Into the Factual Basis for the Forfeiture Component of a Guilty Plea.

1. The Federal Rules of Criminal Procedure treat criminal forfeiture as an element of criminal liability.

Congress enacted two major forfeiture provisions in 1970,[4] and a group of amendments to the Federal Rules of

[4] These procedural innovations were part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 943, *codified as* 18 U.S.C.

Criminal Procedure were adopted in 1972 to implement the legislation. The new rules reflect a deliberate choice to accord criminal forfeiture the same status and procedural protections accorded to the elements of a criminal offense, rather than to treat it as a part of sentencing.

The Reporter for the Advisory Committee on Federal Rules presented two alternative drafts, requiring the Committee to decide how to characterize forfeiture for procedural purposes. One draft "authorize[d] the judge to determine the amount of a criminal forfeiture as part of the sentencing procedure." Memorandum from Frank J. Remington, Reporter, To Advisory Committee on Federal Rules of Criminal Procedure 1 (Aug. 6, 1971), *microformed on* Records of the U.S. Judicial Conference: Committees on Rules of Practice and Procedures, 1935-88 CM-4115-71 (Congressional Information Service). The second draft amended Rules 7, 31, 32, and 54 in accordance with the view that "a criminal forfeiture is an element of criminal liability entitling the defendant to notice, trial, and a special jury finding." *Id.*[5] The reporter noted that research by the Library of Congress supported this latter view. *Id.* at 1-2.[6]

---

§ 1963 (RICO), and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408(a)(2), 84 Stat. 1236, 1265-66, *codified as* 21 U.S.C. § 848 (CCE). The Senate report accompanying RICO characterized criminal forfeiture as "an innovative attempt to call on our common law heritage to meet an essentially modern problem." S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969). The enactment of the RICO forfeiture provision in 1970 (followed closely by the CCE forfeiture provision) marked the first significant federal legislation authorizing forfeiture since 1790, when the first Congress enacted legislation abolishing forfeiture of estate and corruption of the blood. *Id.* at 80; *see infra* pp. 29-30 and n. 23.

[5] Fed. R. Crim. P. 54 was amended to add the word "civil" before the word "forfeiture" in the list of proceedings exempted from the criminal rules, making it plain that the rules apply to criminal forfeiture. 18 U.S.C. App., Notes of Advisory Committee on Rules – 1972 Amendment.

[6] Indeed, this evidence apparently persuaded the Committee to alter its preliminary decision "that the amount of the criminal forfeiture could properly be decided, by the judge, as a matter of sentencing rather than requiring the amount of the criminal forfeiture to be pleaded, proved, made a special verdict, and made part of the judgment." *See* Memorandum from Frank J. Remington, *supra*, at 1.

The text of the final Rules and the Committee's explanatory notes adopt the second view, that forfeiture is an element of criminal liability rather than merely a matter of sentencing.[7] The Federal Rules require criminal forfeiture to be alleged in the indictment or information, found by a special jury verdict, and reflected in a separate judgment. The Rules thus draw a sharp distinction between criminal forfeiture and other issues that are relevant only to sentencing and not subject to these heightened procedural safeguards.[8]

The charging provisions of Federal Rule 7 were amended in 1972 to add subsection (c)(2), which provided that "[w]hen an offense charged may result in a criminal forfeiture, the

---

Petitioner has been unable to locate the Library of Congress report referred to in the reporter's memorandum.

[7] As this Court stated last Term, where "Congress did not amend the Advisory Committee's draft in any way . . . 'the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted.' " *Tome v. United States*, 115 S. Ct. 696, 702 (1995) (plurality opinion) (citation omitted); *see id.* (Advisory Committee Notes are "useful guide in ascertaining the meaning of the Rules"); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988) (Advisory Committee Note, "although not determinative, is 'of weight' in our construction of the Rule") (citation omitted); *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) ("construction given by the Committee is 'of weight' ") (citation omitted); *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 429 (1983) (Advisory Committee Notes "potent evidence").

[8] This is not to deny that forfeiture is imposed at sentencing and treated, for some purposes, as a sentence. *See, e.g.*, 21 U.S.C. § 853(a) ("in imposing sentence" court shall order forfeiture as provided by that section "in addition to any other sentence imposed"). Moreover, petitioner acknowledges that forfeiture, civil as well as criminal, operates as a punishment. *See, e.g., Austin v. United States*, 113 S. Ct. 2801, 2810-12 (1993) (civil forfeiture under 21 U.S.C. §§ 881(a)(4) & (a)(7) is punishment for purposes of excessive fines clause). *Austin* recognizes that the forfeiture provisions enacted in 1970 are not subject to simple characterizations. Though civil forfeiture does not require all of the safeguards that attend a criminal proceeding, it may nonetheless constitute punishment for purposes of the excessive fines clause. *See id.* Criminal forfeiture also defies easy characterization. The Federal Rules of Criminal Procedure treat criminal forfeiture like an element of an offense, according it the safeguards of notice by indictment and jury fact-finding, though criminal forfeiture also operates as a punishment imposed at the time of sentencing.

indictment or information shall allege the extent of the interest or property subject to forfeiture." Amendments to the Federal Rules of Criminal Procedure, 56 F.R.D. 143, 156 (1972). The Advisory Committee Notes state that this amendment was "intended to provide procedural implementation of the recently enacted criminal forfeiture provision[s]" of RICO and CCE. 18 U.S.C. App., Notes of Advisory Committee on Rules – 1972 Amendment. The Notes further state that Congress viewed the new forfeiture provisions as "reestablishing a limited common law criminal forfeiture." *Id.* The Advisory Committee Notes explain the rationale for this amendment to Rule 7:

> Under the common law, in a criminal forfeiture proceeding the defendant was apparently entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction. Subdivision (c)(2) provides for notice.

Id.

Rule 31(e) was adopted at the same time. It requires a "special jury verdict" regarding "the extent of the interest or property subject to forfeiture, if any." Amendments to the Federal Rules of Criminal Procedure, 56 F.R.D. at 159. The Advisory Committee Note accompanying this provision cross-references to the Note that accompanied Rule 7(c)(2) and states that "[t]he assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an *element of the offense* to be alleged and proved." 18 U.S.C. App., Notes of Advisory Committee on Rules – 1972 Amendment (emphasis added).[9]

---

[9] One Ninth Circuit opinion has characterized this statement in the Advisory Committee Notes as "incorrect," *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1578 (9th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990), and several other lower court decisions have disregarded the Note, *e.g.*, *United States v. Elgersma*, 971 F.2d 690, 693 (11th Cir. 1992) (en banc). As discussed in footnote 12, *infra* p. 20, these cases hold that the burden of proof in criminal forfeiture proceedings turns on a statutory presumption not involved in this case, and they should be accorded no weight here.

→

Rule 32 was also amended in 1972 to provide for forfeiture, and the structure of the amended rule clearly distinguished between forfeiture and sentencing. Rule 32(b)(1) provided for the "judgment of conviction," which "shall set forth . . . the adjudication and sentence." Amendments to the Federal Rules of Criminal Procedure, 56 F.R.D. at 160. This provision did not include forfeiture. Forfeiture was addressed separately in Rule 32(b)(2), which provided for "the judgment of criminal forfeiture." *Id.*

Rules 7 and 32 have been amended to make slight changes in the language adopted in 1972, but these amendments do not change the treatment of forfeiture.[10] Indeed, the amendment to Rule 7(c)(2) strengthens the protection provided for criminal forfeiture by explicitly stating that "[n]o judgment of forfeiture may be entered" unless the forfeiture was alleged in the indictment.[11]

Thus the overall structure of the Federal Rules of Criminal Procedure demonstrates that the court of appeals erred in characterizing forfeiture as "a part of the sentence, not a part of the substantive offense." J.A. 322. To the contrary, as this Court recognized in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 628 n.5 (1989), the Federal Rules treat

---

[10] Rule 32 was amended in 1994 to incorporate the " 'Model Local Rule for Guideline Sentencing' " and to reorganize the subsections in sequence. Notes of Advisory Committee on Rules – 1994 Amendment. The provisions of Rule 32(b) quoted above were moved to subsection (d) of the amended Rule and were slightly reworded. Although subsection (d) still separates the discussion of the "judgment of conviction" in subsection (d)(1) from the discussion of forfeiture in subsection (d)(2), subsection (d)(2) no longer includes the phrase "judgment of forfeiture." The Advisory Committee Note indicates no intention to make any substantive change; it states that "[s]ubdivision (d), dealing with entry of the court's judgment, is former subdivision (b)." *Id.* Rule 7(c)(2) still employs the phrase "judgment of forfeiture."

[11] Rule 7(c)(2) was amended to its present form in 1979. It now provides:

> No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

The amendment was intended to clarify the meaning of the rule. *See* 18 U.S.C. App., Notes of Advisory Committee on Rules – 1979 Amendment.

forfeiture as "a substantive charge in the indictment against a defendant."

2. Rule 11(f) requires the court to satisfy itself that there is a factual basis when a defendant's plea includes forfeiture.

The characterization of forfeiture as an element of criminal liability, which governs the charges, the verdict, and the judgment in federal criminal cases, should govern plea proceedings under Rule 11 as well. Forfeiture must be pleaded like a separate charge under Rule 7(c)(2), must be the subject of a special jury verdict under Rule 31(e), and is recorded as a judgment under Rule 32(d). The requirement that there be a factual basis for a guilty plea to a forfeiture charge is a necessary correlative to the procedural protections for criminal forfeiture afforded in Rule 7(c)(2), Rule 31(e), and Rule 32(d).[12]

Rule 31(e), which deals with fact finding in criminal forfeiture cases, is especially pertinent to the proper

---

[12] As explained in note 9, *supra* p. 18, these provisions do not necessarily mean that criminal forfeiture must be treated *for all purposes* as if it were an element of the offense. For example, acceptance of petitioner's arguments in the present case would not determine other issues, such as the standard of proof governing criminal forfeiture. A number of lower courts that have considered the standard of proof governing criminal forfeiture under section 853 have concluded that the standard is a preponderance, rather than beyond a reasonable doubt, because forfeiture is a criminal punishment, part of the sentence, rather than part of the definition of the offense. *E.g.*, *United States v. Elgersma*, 971 F.2d 690 (11th Cir. 1992) (en banc); *United States v. Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990). These decisions find that the section 853(d) statutory presumption adopted in 1984 supports the view that the standard of proof is a preponderance. Assuming arguendo that they are correct, they deal with questions that are quite distinct from the proper interpretation of Rule 11(f). The Rules of Criminal Procedure do not address the standard of proof for forfeiture cases. A conclusion that Congress lowered the burden of proof to a preponderance in 1984 would in no way cast doubt on the need for a factual basis finding under Rule 11(f), an issue that was not considered by Congress in 1984. The dispute in the present case concerns the interpretation of Federal Rules adopted more than a decade earlier. By the same token, a decision in petitioner's favor does not foreclose the argument that section 853 adopted a preponderance standard.

characterization of criminal forfeiture under Rule 11(f) and the question whether forfeiture should be treated as one of the elements which may be encompassed in a plea. It would be remarkable if the relatively minimal showing required by Rule 11(f) – "a factual basis" – were deemed inapplicable to forfeiture despite the extraordinary protection of a special jury verdict in Fed. R. Crim. P. 31(e). Because Rule 31(e) requires a special jury verdict on forfeiture, a forfeiture allegation in an indictment operates like an additional criminal charge, not a mere sentencing provision. A trial and special verdict are still required if the defendant pleads guilty but contests the government's forfeiture claims,[13] just as they would be required if the defendant pleaded guilty to one count but not guilty on other counts. In effect, there are two separate components to a guilty plea in a case involving criminal forfeiture; a defendant must enter pleas – and may enter different pleas – to each component of the case. In contrast, other aspects of non-capital sentencing do not require a jury verdict, and a guilty plea terminates the trial even if it leaves the sentence unresolved.

C. An Inquiry Into the Factual Basis for Forfeiture is Necessary to Determine Whether a Plea is Knowing and Intelligent.

Applying the factual basis inquiry to criminal forfeiture will carry out the core function of Rule 11: ensuring that pleas are knowing and intelligent waivers. The factual basis

---

[13] *See, e.g.*, *United States v. McKeithen*, 822 F.2d 310 (2d Cir. 1987) (forfeiture case tried to jury after defendant pleaded guilty to CCE charge). Many circuit have approved the use of bifurcated guilt and forfeiture proceedings, and some circuits require them. *Compare United States v. Sandini*, 816 F.2d 869, 874 (3rd Cir. 1987) (bifurcation required) *and United States v. Feldman*, 853 F.2d 648, 662 (9th Cir. 1988) (requiring separate jury instructions, deliberations, and closing arguments, but declining to require separate evidentiary hearings in all cases), *cert. denied*, 489 U.S. 1030 (1989) *with United States v. Jenkins*, 904 F.2d 549, 557-58 (10th Cir.) (bifurcation not required if defendant does not advise court of wish to testify on forfeiture issues), *cert. denied*, 498 U.S. 962 (1990) *and United States v. Perholtz*, 842 F.2d 343, 367-68 (D.C. Cir.) (per curiam) (declining to adopt blanket rule), *cert. denied*, 488 U.S. 821 (1988).

inquiry will bring to light cases in which what the defendant admits (or what the government offers to prove) is not sufficient to establish a legal basis for forfeiture, as well as cases in which the defendant did not understand the consequences of his plea, though he thought that he did.

This case is a textbook illustration of the problems that can arise when the district court fails to make the factual basis inquiry. Petitioner contends that he did not knowingly enter an agreement that forfeited all of his property, even property that he could show was not within the reach of 21 U.S.C. § 853.[14] In essence, petitioner contends that he thought he understood the consequences of his plea, though he did not. Petitioner also contends that neither what he admits nor what the government could prove would provide a legal basis for the forfeiture order.

The government interprets the plea agreement as allowing forfeiture of all of petitioner's property of every kind up to a limit of $1.5 million, and the lower courts accepted that interpretation.[15]

---

[14] Petitioner's pro se brief in the court of appeals states (Appellant's Pro Se Opening Br. at 35):

> Defendant would not have entered into the plea agreement or plead [sic] guilty if he shared the government's opinion that the plea agreement denied him of the right to own property and was nothing short of an invitation for a wholesale plundering of everything Defendant owns worth stealing.

The conclusion of the court of appeals (J.A. 324) that petitioner "intended to forfeit all of his property without requiring the government to prove the assets were forfeitable" was made without benefit of any findings on this issue by the district court. The issue was never squarely presented in the district court, where the absence of a factual basis inquiry permitted the parties to maintain conflicting understandings of the plea agreement.

Although the plea agreement stated (J.A. 81) petitioner's agreement that he would not attempt to withdraw his plea and that there were no reasons supporting the withdrawal of his plea, that agreement is not sufficient to bind petitioner to a plea that was not knowing and voluntary.

[15] The court of appeals concluded (J.A. 325) that the plea agreement "unambiguously forfeited all of [petitioner's] property." The district court's effort to amend its original forfeiture order was premised on that court's belated recognition that it had permitted the forfeiture of all petitioner's assets without any determination whether they were tainted or not. *See* J.A. 281-84, 309-10. The court of appeals concluded that the district court's efforts to amend its order were void for lack of jurisdiction. J.A. 317-19.

This interpretation rests principally on paragraph 10 of the agreement, in which petitioner agreed (J.A. 81):

> to transfer his right, title, and interest in all of his assets to the Division of Criminal Investigation of the Wyoming Attorney General including, but not limited to: all real estate; all personal property, including guns, the computer, and every other item now in the possession of the United States; all bank accounts, investments, retirement accounts, cash, cashier's checks, travelers [sic] checks and funds of any kind.

Paragraph 10 was not, however, the only provision in the agreement that dealt with forfeiture. The agreement first mentions forfeiture in paragraph 2, which describes the maximum penalty for the offense to which petitioner pleaded guilty as including "forfeiture of all known assets *as prescribed in 21 U.S.C. § 853* and assets which are discovered at any later time up to $1,500,000." J.A. 79 (emphasis added). In petitioner's view, section 853 imposed an outer limitation on the forfeiture of the property described in paragraph 10, and required a determination of what property was subject to forfeiture. This view finds support in paragraph 9, which stated that petitioner agreed to "provide complete financial disclosure forms requiring the listing of assets and financial interests" and to "identify all assets that were used to facilitate his criminal activity." J.A. 80-81. If all of petitioner's property would be subject to forfeiture, regardless of its connection with any criminal activity, it would not have been necessary for petitioner to identify the particular assets that were tainted, and this provision would have served no purpose.

The court's statements at the Rule 11 hearing did not eliminate this ambiguity, and indeed are wholly consistent with petitioner's understanding of the forfeiture provision. After petitioner was placed under oath, the court asked (J.A. 100):

> Do you understand that all of your property could be forfeited, *the property that is owned by you by reason of any drug transaction*? (Emphasis added.)

Two points about this statement are significant. First, the court appears to limit the potential forfeiture to property "owned by [petitioner] by reason of the drug transaction[s]."[16] Second, the court states that all of petitioner's property "could" be forfeited, lending credence to the view that after the plea was entered there would be a determination whether some – or indeed all – of petitioner's assets were tainted and thus subject to forfeiture. Similarly, at the point when it advised petitioner of the maximum possible penalty, *see* Fed. R. Crim. P. 11(c)(1), the court stated that "all the property that's described in this Count 6 could be forfeited" by petitioner's plea. J.A. 88. Count 6, J.A. 64-67, sought forfeiture of all drug proceeds and all property used to facilitate the CCE, including a list of specified assets; it did not allege that all of petitioner's assets were subject to forfeiture. As described more fully below, *see infra* pp. 25, 31-33, the required advice was misleading because the government ultimately sought to forfeit property not specifically listed in Count 6. *See also* Fed. R. Crim. P. 7(c)(2) (only property listed in indictment or information may be forfeited).

Petitioner states that at the time of his plea he understood the plea agreement to cover only assets that were properly subject to criminal forfeiture, and that he did not understand the agreement to refer to all of his property, substantial

---

[16] In response to a question about the effect of the agreement on later-acquired property, the court stated (J.A. 89):

> As I understand it, I think it has to be the product of a drug transaction to be forfeited. Isn't that your understanding, Mr. Truman?

While Mr. Truman, petitioner's trial counsel, agreed with the court (*id.*), his statement at another point in the hearing (J.A. 149) indicates that he understood that the government was seeking substitute assets. Counsel's statement does not, however, indicate petitioner's understanding that the government was claiming substitute assets, nor does it demonstrate that petitioner understood that there would be no further proceedings to determine the extent of the assets subject to forfeiture. This distinction is crucial. An entitlement to forfeit some undefined amount of substitute assets is not necessarily an entitlement to forfeit all of a defendant's assets.

portions of which he asserts are not in fact subject to forfeiture. Appellant's Pro Se Opening Br. at 35. He has identified numerous items he owned that are covered by the government's reading of the plea agreement, which he contends are not subject to forfeiture under 21 U.S.C. § 853, including a Bicentennial coin collection he acquired in the seventh grade, property he purchased as a high school wage earner, bank accounts opened for him as a child, into which no later deposits were made, a complimentary airline ticket issued to him because of an error on the airline's part, and his employee payroll savings plan from concededly legitimate employment. *Id.* at 33-36. Moreover, it is undisputed that petitioner had substantial legitimate income from his employment. J.A. 262-64. Petitioner has consistently maintained that the assets seized by the government far exceed the sum of the proceeds of his drug offense, and thus the substitute assets provision of section 853 does not justify the forfeiture. As discussed *infra* pp. 32-33, after hearing petitioner's presentation at the March 26, 1993 hearing the district court belatedly recognized that its forfeiture order may have encompassed non-forfeitable assets.

Petitioner contends that he would not have pleaded guilty pursuant to the plea agreement if he had realized that the government and the courts would interpret the agreement to include all of his property, rather than only property that could be shown to be forfeitable as a result of his drug violations. *See* Appellant's Pro Se Opening Br. at 35. A factual basis inquiry would have required the court to determine whether petitioner agreed (or the government could establish) that all of his property was indeed subject to forfeiture. If petitioner and the government had different views of the scope of the agreement, that conflict should have become apparent during the factual basis inquiry. The net result would have been to assure that petitioner's plea did not rest on a fundamental misunderstanding of the scope of the forfeiture to which he would be agreeing, forfeiting every item of property he owned on the basis of such a misunderstanding. *See* 18 U.S.C. App., Notes of Advisory Committee on Rules – 1966 Amendment.

II. REQUIRING A FACTUAL BASIS IS NECESSARY TO ENSURE THAT CRIMINAL FORFEITURE DOES NOT EXCEED ITS STATUTORY MANDATE.

A. Section 853 Authorizes Forfeiture for Only a Limited Class of Tainted Assets.

Although the statutory provisions authorizing criminal forfeiture are extremely broad, they are not unlimited. They require a showing of a substantial nexus between the property in question and the criminal violations punishable by forfeiture. Section 853 authorizes forfeiture for the offense to which petitioner pleaded guilty. Section 853(a) provides for the forfeiture of property constituting or derived from "proceeds" of the offense, property used or intended to be used to "facilitate" the offense, and property which afforded control over the enterprise involved in a CCE violation.[17] Section 853(p) allows forfeiture of substitute property only after the government has first identified property that would be forfeited as either proceeds or property used to facilitate an offense, and then has established one of the specified justifications for forfeiting substitute property in lieu of the tainted property.[18] Property that does not fall within section 853(a) or section 853(p) is not subject to forfeiture under section 853. The plain language of section 853 authorizes forfeiture only of tainted assets, not forfeiture of a defendant's entire estate. Thus the necessary concomitant to inclusion of an item of property in an order of forfeiture is a threshold determination that the property is actually subject to forfeiture under section 853.

---

[17] Section 853(a) is reprinted at App. 1.

[18] Section 853(p) is reprinted at App. 4.

B. Procedural Safeguards are Necessary to Ensure that Forfeiture Does Not Exceed the Limits Set by Congress as a Result of Governmental Overreaching or Simple Mistake.

Where a plea agreement includes criminal forfeiture, the requirement of a factual basis for the forfeiture component of the guilty plea is a procedural safeguard to ensure that criminal forfeiture does not exceed the broad authority of section 853 and confiscate property without legislative authorization.[19] In *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 502 & n.2 (1993), this Court recognized that procedural safeguards are "of particular importance" in the forfeiture context because of the government's "direct pecuniary interest in the outcome of the proceeding." A similar concern animated Justice Scalia's warning regarding fines, which applies equally to criminal forfeiture:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have

---

[19] Although the question presented in this case is the proper interpretation of Rule 11(f), constitutional concerns are also manifest. Separation of powers, double jeopardy, and due process concerns are implicated if federal prosecutors have unchecked authority to pressure criminal defendants to agree to forfeiture that is not authorized by statute. *See, e.g., Whalen v. United States*, 445 U.S. 684, 689 (1980) ("If a federal court exceeds its own authority by imposing multiple punishments not authorized by Congress, it violates not only the specific guarantee against double jeopardy, but also the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty.") (footnote omitted); *id.* at 689 n.4 (Due Process Clause "would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law"); *see also Mistretta v. United States*, 488 U.S. 361, 391 (1989) (discussing the "responsibility of federal judges to pronounce sentence within the statutory range established by Congress" in holding that Sentencing Guidelines do not violate separation of powers); *Missouri v. Hunter*, 459 U.S. 359, 366 (1983) (Double Jeopardy Clause's protection against multiple punishments "prevent[s] the sentencing court from prescribing greater punishment than the legislature intended").

> recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.

Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.).

Forfeiture has become a major revenue source for the federal government at a time of high deficits and public pressure for both a balanced budget and tax cuts. More than $3.2 billion was deposited in the Justice Department Assets Forfeiture Fund between 1985 and 1993, the last year for which totals are available. *Annual Report of the Department of Justice Asset Forfeiture Office Fiscal Year 1993* 16.[20] The Justice Department concedes that raising revenue has become "an ancillary benefit" of forfeiture, and that the "reinvestment of forfeiture proceeds in law enforcement has made possible the remarkable growth in federal forfeitures." *Id.* at 15. As one governmental official remarked, the government's aim in forfeiture cases is "'to hurt the bad guy and maximize profit for the Government.'" Lisa Belkin, *The Booty of Drugs Enriches Agencies*, N.Y. Times, Jan. 7, 1990, at A18, col. 1.

The potential for governmental overreaching in the context of forfeiture has long been recognized. Writing more than 150 years ago Joseph Story stated:

> The history of other countries abundantly proves, that one of the strong incentives to prosecute offences, as treason, has been the chance of sharing in the plunder of the victims. Rapacity has been thus stimulated to exert itself in the service of the most corrupt tyranny; and tyranny has been thus furnished with new opportunities of indulging its malignity and revenge; of gratifying its envy of the

---

[20] In fiscal 1993, $555.7 million were deposited in the Justice Department Assets Forfeiture Fund, and the proceeds of U.S. Marshals' sales of forfeited property reached a record high of $155.8 million. *Annual Report of the Department of Justice Asset Forfeiture Office Fiscal Year 1993* 16. During the same year federally-forfeited cars, boats, and other property worth $10.2 million were transferred to state and local law enforcement agencies, and property worth $12.8 million was retained for use by federal law enforcement agencies. *Id.* at 17.

> rich, and good; and of increasing its means to reward favourites, and secure retainers for the worst deeds.

3 Joseph Story, *Commentaries on the Constitution of the United States* 173 (reprinted Fred B. Rothman & Co. 1991) (Boston 1833) (footnote omitted).

The Framers acted to limit forfeiture. Both the Constitution and legislation passed by the first Congress rejected the English practice of attainder and forfeiture of estate.[21] Article III provides that "[N]o Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." U.S. Const. art. III, § 3, cl. 2.[22] When the

---

[21] The concept of forfeiture of estate derives from medieval English law. In feudal times, when a tenant committed a great breach of the bond between the tenant and his lord, he committed a felony and his lands escheated to his lord. 3 William S. Holdsworth, *A History of English Law* 67 (3d ed. 1927). As the definition of felony changed to mean a serious crime, a man convicted of a felony escheated his real property to the Crown for a year and a day, after which the property reverted to the lord; the felon forfeited his personal property to the Crown. *Id.* at 68-69; 1 Frederick Pollock & Frederic W. Maitland, *The History of English Law* 351-52 (2d ed. 1898); 4 William Blackstone, *Commentaries* *385-86 (reprinted Dennis & Co. 1965) (St. George Tucker ed., Phila. 1803). In cases of treason, however, the convicted traitor forfeited both his real property and his chattels to the Crown. 3 William S. Holdsworth, *supra*, at 70-71; 1 Frederick Pollock & Frederic W. Maitland, *supra*, at 351. In addition, the convicted or "attainted" felon was also subjected to "corruption of blood," whereby he lost his ability to inherit, to own, and to devise property. *See* 3 William S. Holdsworth, *supra*, at 69. Corruption of blood was abolished in England in 1834, and the last vestiges of forfeiture of estate were abolished in 1870. *Id.* at 70-71.

[22] There was little debate over this provision. *See* 3 Joseph Story, *supra*, at 172. What discussion there was centered on the definition of treason rather than the appropriate punishment. *See* Nathaniel C. Towle, *A History and Analysis of the Constitution of the United States* 196-98 (reprinted Fred B. Rothman & Co. 1987) (3d ed. Boston 1871).

While the issue is not before the Court in the instant case, forfeiture of estate may be constitutionally prohibited in all felony cases, not merely in treason cases. *See United States v. Grande*, 620 F.2d 1026, 1037-39 (4th Cir.) (in light of irrationality of prohibiting forfeiture of estate for treason but not for lesser offenses, Article III, section 3, clause 2 almost certainly would bar statutory forfeiture of estate) (dicta), *cert. denied*, 449 U.S. 919 (1980). *See generally* Michael P.A. Cohen, Note, *The Constitutional Infirmity of RICO Forfeiture*, 46 Wash. & Lee L.

first Congress enacted various federal criminal offenses, it provided that no conviction or judgment for those offenses "shall work corruption of blood, or any forfeiture of estate." An Act for the Punishment of Certain Crimes Against the United States, Statute 2, ch. 9, § 24, 1 Stat. 112, 117 (1790). As subsequently codified, this provision was made applicable to all offenses. *See* 18 U.S.C. § 3563 (1982).[23]

In developing the forfeiture provisions for RICO and CCE in 1970, Congress drew a sharp distinction between forfeiture of a defendant's entire estate – which continues to be unlawful – and forfeiture of specific assets shown to have been tainted by criminal conduct.[24] Both the CCE and RICO forfeiture provisions define a limited class of tainted assets that may be forfeited[25]; neither authorizes forfeiture of a

---

Rev. 937, 950-51 (1989) (constitutional prohibition of forfeiture of estate for treason implicitly precludes it for less serious offenses).

[23] Section 3563 was repealed in 1984. *See* note 24, *infra*. Many states have constitutional or statutory provisions modeled on section 3563. For a list of these provisions, see James R. Maxeiner, Note, *Bane of American Forfeiture Law – Banished at Last?*, 62 Cornell L. Rev. 786, 795 n.162 (1977).

[24] The Senate report accompanying the RICO forfeiture provision enacted in 1970 stated that it would repeal section 3563 by implication. S. Rep. No. 617, 91st Cong., 1st Sess. 80 (1969). The Comprehensive Forfeiture Act of 1984, which redefined the property subject to forfeiture and codified the "relation back" and "taint" theories, also explicitly repealed section 3563. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1837, 1987. Congress apparently viewed this as a housekeeping or technical amendment reflecting the fact that the detailed provisions enacted in 1970 and 1984 now defined the scope of forfeiture. Certainly there was no suggestion that the repeal was intended to provide positive authorization of forfeiture of estate, which would be at odds with the careful efforts to define a more limited forfeiture authority.

[25] RICO originally authorized forfeiture of any interest maintained or acquired in violation of the RICO statute, and any interest affording influence over the enterprise involved in the RICO violation. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922, 943. A 1984 amendment to RICO authorized forfeiture of property constituting or derived from the proceeds of racketeering activity. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 302, 98 Stat. 1837, 2040. CCE originally authorized forfeiture of the profits of the continuing criminal enterprise and any interest affording a source of control over the enterprise. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No.

defendant's entire estate. *See* S. Rep. No. 617, 91st Cong., 1st Sess. 80 (1969) (RICO authorizes only "limited" forfeiture of interest in the enterprise involved in the offense "not extending to any other property of the convicted offender"); S. Rep. No. 613, 91st Cong., 1st Sess. 28 (1969) (CCE modeled on Title X of the Organized Crime Control Act of 1969, a bill later adopted as RICO); *see also United States v. Grande*, 620 F.2d 1026, 1037-39 (4th Cir.) (upholding RICO against constitutional challenge under Article III, section 3, clause 2 because it does not authorize forfeiture of estate, but only forfeiture of a limited class of assets with nexus to offense), *cert. denied*, 449 U.S. 919 (1980).

The factual basis requirement will prevent not only unlawful forfeitures, but also unintended forfeitures. In the absence of this procedural safeguard property may be forfeited through simple error. As the court explained in *United States v. Roberts*, 749 F.2d 404, 409-10 (7th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985), the possibility for error in determining whether the statute authorizes the forfeiture of a particular asset "is considerably greater than the possibility of error in determining the maximum jail sentence determined by law."

C. If No Factual Basis is Required, the Prosecution May Use the Plea Process to Work a Forfeiture of Estate Rather Than the Statutorily Authorized Forfeiture of Tainted Assets.

In the absence of a factual basis requirement for forfeiture pursuant to a guilty plea, the prosecution may use the plea process to exceed the limitations imposed by Congress in

---

91-513, § 408(a), 84 Stat. 1236, 1265-66, *codified as* 21 U.S.C. § 848(a). In 1984 forfeiture was deleted from section 848, and section 853 was enacted. It provided for the forfeiture of property constituting or derived from the proceeds of drug offenses, property used or intended to be used to commit or facilitate these offenses, and property affording a source of control over a continuing criminal enterprise. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 303, 98 Stat. 1837, 2044-45. In 1986 Congress amended both RICO and section 853 to permit forfeiture of substitute assets. Act of Oct. 27, 1986, Pub. L. No. 99-570, § 1153, 100 Stat. 3207, 3207-13.

section 853, even to the extent of forfeiture of estate. Indeed, in the instant case the government and the courts below interpreted the plea agreement as working a forfeiture of petitioner's entire estate without the necessity of showing any factual basis. Petitioner contends that the agreement so construed covers many assets for which forfeiture is not authorized by section 853, and the district court's postverdict proceedings lend substantial support to his claims. Although the court of appeals concluded (J.A. 318-19) that the district court lacked jurisdiction to conduct these proceedings, the district court's actions leave no doubt that it considered further proceedings necessary to determine which of petitioner's assets were subject to forfeiture under section 853.

At the postverdict hearing on March 26, 1993, petitioner convinced the district court that further evidentiary proceedings were necessary to determine whether its forfeiture order encompassed nontainted as well as tainted assets. Petitioner testified that he had been employed as an accounting supervisor for General Chemical. J.A. 264. His income from this concededly legitimate employment with General Chemical was more than $48,000 in 1989 (plus fringe benefits that reduced his living expenses), and by 1991 his annual salary had increased to almost $53,000. J.A. 262-64.[26] In view of his substantial legitimate income, petitioner argued that it was improper for the government to "proceed on the assumption that all these properties are drug proceeds, because they aren't." J.A. 264. Petitioner conceded (J.A. 265-67) that some of his bank accounts included tainted and untainted assets, and argued that the government was entitled to forfeit only the tainted portion of the assets, which might be calculated by several different methods. J.A. 265-75. For example, petitioner argued that nontainted funds had been used to purchase the Star Valley, Wyoming property. J.A. 266-75.

Noting that "[t]he question before me is whether or not the property that you are forfeiting is tainted or not" (J.A. 281), the district court concluded that a factual hearing would be necessary because "I'm going to know what the facts are before I do a thing." J.A. 283. The court specifically stated, "I think there is a possibility" that the Wyochem bank account was "not tainted." J.A. 292. With regard to the Star Valley property, the court stated, "I don't think we can tell whether the money that came out of the Wyochem account for that property is tainted or nontainted." *Id.*

The court refused to rule on the government's substitute assets theory. J.A. 288. In response to the government's claim that substitute assets were forfeitable because the petitioner had concealed tainted assets, the court responded, "I don't know that he has. You might suspect it, but can you proove [sic] it?" J.A. 289.

After the hearing, the district court drafted an order which stated (J.A. 309):

> [A]fter further review of the plea agreement and the December 23, 1992 Order of Forfeiture, the Court has determined that it may be unjust to enforce the specific forfeiture provisions in the plea agreement. Forfeiture statutes do not mandate forfeiture of property purchased with legitimate funds.

The jurisdictional defect that deprived the district court's order of its effect casts no doubt on the correctness of that court's conclusion that an inquiry is needed to determine whether there is a factual basis for the order forfeiting *all* of petitioner's property, even property acquired before the offense and income from his legitimate employment.

D. In Light of the Disparity in Bargaining Power Between the Government and the Defendant, the Defendant's Agreement to Forfeiture Provides No Real Assurance that It Meets the Criteria of Section 853.

A defendant's agreement to forfeit assets provides no real assurance that the forfeiture meets the criteria of section 853. The severe sentences available under the drug laws, augmented by related weapons and money laundering charges,

---

[26] These figures are roughly consistent with the Presentence Report (PSR), which states that petitioner was "a full time accounting supervisor earning approximately $40,000 per year." Presentence Investigation Report 20, ¶ 35.

allow prosecutors to exert tremendous pressure on defendants to forfeit property that falls outside section 853 in exchange for sentence concessions. For example, in this case the prosecutor agreed not to proceed with a count that could have resulted in a mandatory consecutive penalty of 30 years.[27] The disparity in bargaining power created by the current federal sentencing structure creates a significant danger that defendants will be pressured in plea negotiations to forfeit assets that fall outside the limits set in section 853, even to the point of forfeiture of estate, without regard to taint of the included assets. The court of appeals correctly recognized that only a lawful plea agreement is enforceable, J.A. 322-23, but it failed to look beyond the agreement to examine whether the government's interpretation was lawful. This failure contributed to the court's misunderstanding of the role of Rule 11(f).

III. A FACTUAL BASIS INQUIRY IS NECESSARY TO PROVIDE SOME MEASURE OF PROTECTION TO THIRD PARTIES WHOSE INTERESTS MAY BE AFFECTED BY FORFEITURES OBTAINED PURSUANT TO PLEA AGREEMENTS.

The need to protect the property rights of third parties provides a powerful additional reason that a court accepting a guilty plea should be required to satisfy itself that there is a factual basis supporting any forfeiture. As noted in Section II, *supra* pp. 33-34, the drug laws provide federal prosecutors with so much leverage that defendants may agree to forfeit property falling outside the scope of section 853 in order to obtain shorter sentences of imprisonment. The danger that a defendant will agree to forfeit property falling outside the reach of section 853 is even greater when the property sought

---

[27] Count 2 alleged that petitioner "used and carried multiple conventional firearms, semi-automatic rifles and handguns, fully automatic weapons, and silencers." J.A. 54-55. The government's brief in the court of appeals argued that petitioner was facing a mandatory consecutive 30-year term on this charge. Br. of Appellee at 3. In addition, the indictment contained other charges that might have increased petitioner's sentence if he had gone to trial. *See* J.A. 38-56, 68-71.

by the government is not in fact his own. As both courts and commentators have recognized, " 'a defendant will have no incentive to avoid agreeing to the forfeiture of assets which he or she has already transferred to a third party.' " 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases* § 14.09, at 14-69 (1992), *quoting United States v. De Ortiz*, 910 F.2d 376, 384 (7th Cir. 1990).

A. Third Parties Are Deprived of Important Procedural Rights in the Ancillary Hearing Afforded Under 21 U.S.C. § 853(n).

The erroneous forfeiture of a third party's property pursuant to a guilty plea strips the owner of important procedural rights and imposes significant hardship. Although the federal forfeiture laws provide a mechanism for the assertion of third-party rights,[28] the entry of a forfeiture order pursuant to a plea agreement strips the owner of the right to a jury trial and reverses the burden of proof, so that the government prevails unless the owner carries the burden of proof.[29]

---

[28] The owner of property that has been erroneously forfeited pursuant to section 853 is required to assert his claim under 21 U.S.C. § 853(n), which is reprinted at App. 1-3. RICO establishes the same procedure for the adjudication of third-party claims. *See* 18 U.S.C. § 1963(l).

[29] Section 853(n)(6) provides that the court shall amend the order of forfeiture if it determines that the third-party claimant has established his case "by a preponderance of the evidence." The RICO provisions are identical. *See* 18 U.S.C. § 1963(l)(6).

In contrast, if the government had proceeded in a civil forfeiture action, trial by jury would be constitutionally required. *See United States v. One 1976 Mercedes-Benz 280S*, 618 F.2d 453, 456 (7th Cir. 1980); *The J.W. French*, 13 F. 916, 924 (E.D. Va. 1882); 5 J. Moore, *Federal Practice Digest* ¶ 38.31[1] (2d ed. 1987); *see also C.J. Hendry Co. v. Moore*, 318 U.S. 133, 152-53 (1943) (in cases of property seized on land for violations of federal statutes, district courts proceed as courts of common law in rem with trial by jury). With regard to the burden of proof, in a civil forfeiture proceeding the government must demonstrate probable cause to believe that the asset in question is subject to forfeiture at the outset of the proceeding; if this showing is made, then the burden shifts to those who seek to show the res is innocent. *See* 19 U.S.C. § 1615; *see also* 21 U.S.C. § 881(d) (customs laws applicable to civil drug forfeitures). In contrast, under the government's theory it is

B. The Interests of Some Third Parties May Be Extinguished Without Recourse as a Result of Criminal Forfeiture.

While the interests of all third-party owners are adversely affected by forfeiture pursuant to a guilty plea, in some cases the guilty plea will extinguish the third party's property rights completely, and without recourse. Once forfeiture has been ordered pursuant to section 853, the ancillary hearing under section 853(n) appears to be the exclusive mechanism for the recognition of third-party claims.[30] That section, however, does not provide relief for all third parties whose property rights can be affected by a guilty plea and forfeiture. While 21 U.S.C. § 853(n)(2) provides that "[a]ny person . . . asserting a legal interest in property which has been ordered forfeited" may file a petition for a hearing to adjudicate his interest, other provisions restrict the relief offered in a manner that appears to exclude some third-party owners. The statute provides relief for only two classes of persons, bona fide purchasers for value, and persons whose rights vested before the commission of the offense. *See* 21 U.S.C. § 853(n)(6)(A) & (B).

Section 853 contains no general innocent owner provision, and it makes no provision for a third party whose property was forfeited erroneously under section 853 unless he or she falls within one of these two categories. For example, no provision is made for a person who receives property after the date of the offense by means other than a bona fide purchase for value, such as by gift. Even if such a claimant could establish title to the property and the erroneous nature of the forfeiture, section 853 appears to provide no avenue of relief. For these bona fide property owners an erroneous order

---

required to make no factual showing before it shifts the burden to a third-party owner when it proceeds by criminal forfeiture pursuant to a guilty plea.

[30] *See* 21 U.S.C. § 853(n)(7) (following the adjudication of all petitions under subsection (n) "the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee").

of forfeiture has the effect of confiscating their property and leaving them with no legal recourse.

C. In the Instant Case the Property Rights of Third Parties Were Prejudiced By Entry of the Forfeiture Order Pursuant to Petitioner's Plea Agreement.

This case illustrates the harmful consequences of allowing the forfeiture of third-party interests pursuant to a forfeiture agreement in a guilty plea that has never been subjected to a factual basis inquiry. One claim asserted at the ancillary hearing in this case concerned two bank accounts held jointly by petitioner and his parents. These accounts were established during petitioner's childhood, and they contained his birthday, confirmation, and allowance money, and money petitioner earned in high school. J.A. 188-89. Since petitioner was a joint owner, the government sought to forfeit these accounts pursuant to its interpretation that the plea agreement included all of petitioner's property, without exception. *See* J.A. 288-89.

Though they had no notice of petitioner's unlawful activities and the funds in the bank accounts were deposited many years prior to those activities, Dr. and Mrs. Libretti were stripped of their right to a jury trial and required to carry the burden of proving that the property in question was not subject to forfeiture. The government deprived Dr. and Mrs. Libretti of these procedural rights by operation of a plea agreement entered in a proceeding to which they were not parties, a proceeding in which the government claims it was not required to show a factual basis for the forfeiture in question. As construed by the government and the courts below, this agreement allowed the forfeiture of bank accounts holding only untainted funds acquired by petitioner's parents many years before the offense in question, and required them to defend their interests without the usual procedural protections.

Dr. and Mrs. Libretti's interest in the Star Valley property was even more dramatically and adversely affected. Petitioner

transferred title to the Star Valley property to his parents after his arrest in an effort to compensate them for the retainer they had paid defense counsel on his behalf. J.A. 307. Petitioner testified at the ancillary hearing that he acquired the Star Valley property with legitimate funds taken from his Wyochem account, and, as noted above, the district court found sufficient merit in petitioner's arguments to necessitate a factual hearing on the matter. *See supra* pp. 32-33; J.A. 307. Assuming arguendo that petitioner can demonstrate that the Star Valley property was not forfeitable under section 853, the government may nevertheless challenge his parents' right to the property if petitioner transferred it to them after the date of the offense in a transaction that did not constitute a bona fide purchase for value. Following the same logic, it appears that the district court erred in returning the diamond ring to petitioner's fiancee, Claudia Porter, because the transfer to her was a gift, not a sale, and it occurred after the offense had begun.[31]

D. Congress Did Not Intend for the Interests of Third Parties to be Disturbed By Criminal Forfeiture Unless the Government First Established a Reliable Basis for the Forfeiture.

In adopting section 853, Congress justified the procedural restrictions on the rights of third-party claimants on

[31] The district court found that since Ms. Porter knew of petitioner's legitimate funds from his employment, she had no way of knowing whether the ring had been purchased with legitimate or illegitimate funds. J.A. 292. The court then sustained her claim with the comment, "I think the Court would be the biggest bully in the world if it went around taking ladies' rings from them. So I'm going to give the ring back." *Id.* In so ruling, the court apparently relied on *United States v. A Parcel of Land, Bldgs., Appurtenances and Improvements, Known as 92 Buena Vista Ave., Rumson, N.J.*, 113 S. Ct. 1126 (1993). That case, however, concerned a civil claim under 21 U.S.C. § 881(a)(6), which includes an "innocent owner" provision that appears to be broader than the bona fide purchaser for value provision in section 853.

the ground that the government would already have established a firm evidentiary basis for the forfeiture of the property at issue. The Senate Report accompanying section 853 explained:

> Since the United States will have already proven its forfeiture allegations in the criminal case beyond a reasonable doubt, the burden of proof at the hearing will be on the third party.

S. Rep. No. 225, 98th Cong., 2d Sess. 209, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3392. While the government will not have met this strict standard if the defendant has pleaded guilty, a factual basis inquiry is necessary to provide at least a minimal justification for the procedural provisions of section 853(n). Indeed, forfeiture of third parties' interests pursuant to a plea agreement accepted by the court without any factual basis may even deprive the third parties of their rights without due process of law.

IV. THE DISTRICT COURT'S FAILURE TO CONDUCT A FACTUAL BASIS INQUIRY INTO THE FORFEITURE COMPONENT OF PETITIONER'S PLEA VIOLATED PETITIONER'S SUBSTANTIAL RIGHTS.

There is no merit to the government's argument (Br. in Op. at 15 n. 10) that petitioner is entitled to no relief even if Rule 11(f) required the district court to find a factual basis for the forfeiture. The district court's failure to make a factual basis inquiry into the forfeiture component of petitioner's plea led to exactly the kind of difficulties that Rule 11(f) is intended to avoid.[32]

[32] The court of appeals properly assumed that the district court made no factual basis inquiry regarding the forfeiture in the instant case. As described in greater detail, *see supra* pp. 32-33, the district court never focused on the scope of the forfeiture agreement, which has been interpreted to include *all* of petitioner's assets, until after petitioner filed his notice of appeal. The only time the court addressed the issue of the factual basis for the forfeiture was at the close of the sentencing hearing. After the court imposed sentence, ordered that petitioner's

Fed. R. Crim. P. 11(h) provides that a court's failure to comply with the requirements of Rule 11 does not warrant relief unless the error "affect[s] substantial rights." The Advisory Committee Notes state that the types of Rule 11 errors that are harmless are "fairly limited." 18 U.S.C. App., Notes of Advisory Committee on Rules – 1983 Amendment. The harmless error rule is not intended to nullify the safeguards provided by Rule 11. *Id.*

A Rule 11 violation is not harmless when the error leads to entry of a plea that was not knowing and intelligent, or produces a record that is insufficient to demonstrate that the plea was knowing and intelligent. In *McCarthy v. United States*, 394 U.S. 459 (1969), this Court explained the purpose of Rule 11 and its constitutional underpinnings. The procedures established in Rule 11 are designed to assist the trial court in determining that the plea is truly knowing and voluntary, and to produce a complete record in support of the voluntariness determination. *Id.* at 465. Rule 11 has a constitutional foundation: "[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *Id.* at 466 (footnote omitted); *see also Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (error was plain on the face of the record when court accepted guilty plea without an affirmative showing that plea was knowing and voluntary).

Petitioner contends that he did not understand the nature of the agreement to which he was pleading (as that agreement

---

property be forfeited, remanded petitioner to the marshal's custody, and stated that the hearing was finished, petitioner lodged a pro se objection to the lack of any factual basis for "the whole forfeiture." J.A. 154. At that point the district court stated "the evidence that I heard before me in the two days of trial I think is sufficient to warrant the granting of forfeiture. I think I have no alternative." *Id.* This conclusory statement indicated no recognition of the scope of the forfeiture being sought and the factual issues necessarily raised by the government's attempt to forfeit tainted and untainted assets under a substitute assets theory. There was no finding regarding the factual basis for the legal theory supporting the forfeiture of all of petitioner's property, tainted and untainted. Moreover, the district court belatedly recognized that its forfeiture order may have improperly encompassed property not subject to forfeiture. *See supra* pp. 32-33.

has been construed by the government and the courts below), and that he would not have entered the plea if he had been informed that it forfeited all of his untainted property. This misunderstanding goes to a matter of real substance: the question whether petitioner had agreed to forfeit *all* of his property, even though he had substantial legitimate income and assets.

Petitioner also contends that neither what he admits nor what the government could prove would in fact be sufficient to provide a legal basis for the forfeiture sought by the government. Since petitioner had substantial legitimate income, as well as assets acquired before the offense in question, the government could not justify the forfeiture of *all* of his property by showing that he had committed a CCE violation and derived substantial income from it. *See* 21 U.S.C. § 853(d) (rebuttable presumption of forfeitability invoked only if property was acquired during or after the offense, and defendant had no other likely source for the property). It is undisputed that petitioner possessed substantial legitimate assets.

In light of the prejudicial failure to comply with Rule 11(f) and the resulting lack of understanding on petitioner's part regarding the consequences of his plea, this Court should reverse and remand the case for inquiry into the factual basis supporting petitioner's plea to the forfeiture charge, and for other proceedings as necessary in light of this inquiry.

V. BOTH RULE 31(e) AND THE SIXTH AMENDMENT AFFORD A RIGHT TO JURY TRIAL ON THE NATURE AND EXTENT OF ANY PROPERTY SUBJECT TO FORFEITURE IN A CRIMINAL PROCEEDING.

Both the Sixth Amendment and Fed. R. Crim. P. 31(e) carry forward the common law tradition of submitting forfeiture to the petit jury. A waiver of the right to a jury trial on forfeiture must be express and must constitute the intentional relinquishment of a known right. Petitioner made no such waiver in the instant case. Petitioner was never advised of his right to a jury determination of forfeiture, and neither his

guilty plea nor his plea agreement expressly relinquished that right.

A. At Common Law the Issue of Criminal Forfeiture Was Submitted to the Jury.

Common law juries in both England and the American colonies made findings on criminal forfeiture. Reference works used by English judges and court personnel during the seventeenth and eighteenth centuries record the standard charge to the jury on the issue of forfeiture. For example, in 1799 *The Crown Circuit Companion* instructed that once the jury had finished deliberating, the clerk should advise them as follows:

> *Look upon the prisoner; you that are sworn, what say you, is he guilty of the felony whereof he stands indicted, or not guilty?* If they say *Guilty,* then the clerk asks them, *What lands or tenements, goods or chattels, he* (the prisoner) *had at the time of the felony committed, or any time since?*

Thomas Dogherty, *The Crown Circuit Companion* 21-22 (1799) (emphasis in original). This charge was little changed from the charge recommended more than a century earlier in *The Office of the Clerk of Assize and The Office of the Clerk of the Peace* 71-72 (1676) (microformed in Wing, *Early English Books*, 1641-1700, reel 829).

In his *History of the Pleas of the Crown*, Sir Matthew Hale reports:

> The usage was always upon a presentment of homicide before the coroner, or of flight for the same, or upon a conviction of felony by the petit jury, or the finding of a flight for the same, to charge the inquest or jury to enquire, what goods and chattels he hath, and where they are . . . .

1 Matthew Hale, *History of the Pleas of the Crown* 363 (1778 ed.). Similarly, in describing what property was subject to forfeiture, William Hawkins reported that the question whether a trust created by the accused was forfeitable "is to be left to a Jury on the whole Circumstances of the Case, and

shall never be presumed by the Court where it is not expressly found." 2 William Hawkins, *Pleas of the Crown 1716-21* 450 (1721 ed.).

The English authorities also suggest that the harsh remedy of forfeiture was not popular with juries, and efforts to nullify forfeiture by a verdict finding no property were common. *See The Crown Circuit Companion, supra* p. 42, at 22 (jury commonly found no property); *The Office of the Clerk of the Assize and The Office of the Clerk of the Peace, supra* p. 42, at 72 (same); *cf.* 4 William Blackstone, *Commentaries* *387 (reprinted Dennis & Co. 1965) (St. George Tucker ed., Phila. 1803) (juries would seldom find flight because forfeiture was viewed as too severe a penalty for that offense).

Although the colonial record is sparse, there is evidence that the common law practice of submitting the issue of forfeiture to the jury was followed in the American colonies, and that colonial juries on occasion employed this authority to prevent unjust forfeitures. Juries in colonial New York heard the prosecutions arising out of the Leisler Rebellion and returned verdicts finding no forfeitable lands, tenements, or chattels for any of those convicted, though forfeitable properties were subsequently identified by a writ of enquiry. Julius Goebel & T. Raymond Naughton, *Law Enforcement in Colonial New York* 713 (1944). In fact, colonial juries in New York "almost invariably reported no lands, tenements, or chattels upon conviction." *Id.* at 715. This was true even in the case of a merchant who was not without means. *Id.* It appears that juries were reluctant to "cast upon the county the support of a convict's wife and family." *Id.* at 717. The New York colonial records also reveal at least one instance where officials brought baseless treason charges to raise revenue by forfeiture.[33]

---

[33] Goebel and Naughton report Lord Cornbury's charge that the treason prosecution of Bayard and Hutchins was brought "in order that the debts of the Province might be satisfied from the forfeitures." Julius Goebel & T. Raymond Naughton, *supra*, at 714. The Order in Council reversed the sentences and subsequent acts of assembly restored the defendants' property. *Id.*

Criminal forfeitures were rare in this country during the first 180 years after adoption of the federal constitution, but there is evidence that the common law practice of trying criminal forfeiture to the jury carried forward into state law. Sitting as circuit justice and applying the Rhode Island constitution, Justice Curtis concluded that in a criminal forfeiture prosecution

> the owner would be entitled to a trial by jury, and to have the accusation, relied upon to work the forfeiture, set forth substantially, in accordance with the rule of the common law, so that he could discern its nature and cause.

Greene v. Briggs, 10 F. Cas. 1135, 1142 (C.C. D. R.I. 1852) (No. 5,764).

B. The Sixth Amendment Incorporates the Common Law Right to a Jury Determination of the Property Subject to Criminal Forfeiture.

The purpose of the right to trial by jury is "to prevent oppression by the Government" and to provide a "safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (footnote omitted). As developed more fully at pp. 27-29, *supra*, the potential for raising enormous revenues by forfeiture naturally gives rise to a danger of governmental overreaching. Historically the jury has served as a safeguard against such governmental oppression.

The standard for determining when a jury trial is required is the common law. As Justice Powell observed, "[t]he reasoning that runs throughout this Court's Sixth Amendment precedents is that, in amending the Constitution to guarantee the right to jury trial, the framers desired to preserve the jury safeguard as it was known to them at common law." *Johnson v. Louisiana*, 406 U.S. 366, 370-71 (1972) (Powell, J., dissenting in Nos. 69-5035 and 69-5046) (footnote omitted). While some of this Court's opinions have departed from the common law precedents in defining the characteristics of trial

by jury,[34] this Court has not retreated from the principle that the Sixth Amendment guarantees a jury trial in cases where that safeguard would have been available at common law.

The historical record discussed above makes it clear that the determination of the property subject to criminal forfeiture was submitted to the jury in England and the American colonies, and that jury verdicts finding no property placed an important check on government authority. Accordingly, the determination of the property, if any, that is subject to criminal forfeiture should be recognized to be a part of the criminal prosecution for purposes of the Sixth Amendment, which guarantees the right to a jury trial "in all criminal prosecutions." U.S. Const., amend. VI.

C. Rule 31(e) Supplements the Sixth Amendment By Requiring a Special Jury Verdict on the Nature and Extent of Property Subject to Criminal Forfeiture.

The Sixth Amendment right to a jury determination of criminal forfeiture is supplemented by Fed. R. Crim. P. 31(e), which requires a special jury verdict on "the extent of the interest or property subject to forfeiture, if any." Special verdict provisions are rare in criminal cases. 18 U.S.C. App., Notes of the Advisory Committee on Rules – 1972 Amendment. Indeed, forfeiture is the only matter on which the Federal Rules of Criminal Procedure require a special verdict. As described more fully above, *see supra* pp. 15-21, Rule 31(e) and companion amendments to Rules 7 and 32 reflect the common law tradition that a defendant had the right to notice, trial, and a special jury finding on criminal forfeiture, which the Rules treat as an element of criminal liability.

---

[34] *See, e.g., Williams v. Florida*, 399 U.S. 78, 99 (1970) (since there is no evidence that framers meant to "equate the constitutional and common-law characteristics of the jury," Sixth Amendment does not require jury unanimity).

Rule 31(e) reflects the heightened procedural safeguards that are required when the government seeks criminal forfeiture. It stands firmly on both a common law and a constitutional foundation, carrying forward the tradition of requiring any government claims to criminal forfeiture to be submitted to the jury, the historic safeguard against governmental overreaching.

VI. THE RIGHT TO A JURY DETERMINATION OF CRIMINAL FORFEITURE CAN BE EXTINGUISHED ONLY BY A KNOWING AND INTELLIGENT WAIVER.

A. The Waiver of the Sixth Amendment Right to Trial By Jury Must Constitute the Intentional and Intelligent Relinquishment of a Known Right.

This Court's prior decisions make it clear that an intentional relinquishment – in other words, a knowing and intelligent waiver – is required to extinguish the Sixth Amendment right to trial by jury. The Sixth Amendment cases follow the general rule that the waiver of a constitutional right must be the "intentional relinquishment or abandonment of a known right or privilege." *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

The Court applied the standard of a knowing and intelligent waiver to the right to jury trial in *Adams v. United States ex rel. McCann*, 317 U.S. 269, 278 (1942) (citation and footnote omitted, emphasis added), where it stated:

> [O]ne charged with a serious federal crime may dispense with his Constitutional right to jury trial, *where this action is taken with his express, intelligent consent*, where the Government also consents, and where such action is approved by the responsible judgment of the trial court. And whether or not there is *an intelligent, competent, self-protecting waiver* of jury trial by an accused must depend upon the unique circumstances of each case.

The knowing and intelligent waiver standard was articulated to ensure "the validity of a defendant's decision to forego a right constitutionally guaranteed to protect a fair trial and the reliability of the truth-determining process." *Schneckloth v. Bustamonte*, 412 U.S. 218, 236 (1973); *see id.* at 237 (knowing and intelligent waiver standard applies to waiver of right to trial by jury).

Fed. R. Crim. P. 23(a) restates the constitutional right to trial by jury and requires a written waiver of that right. The requirement of a written waiver embodied the existing practice in 1945, when the Rules of Criminal Procedure were adopted. 18 U.S.C. App., Notes of Advisory Committee on Rules. The purpose of this requirement is "to ensure that a criminal defendant is aware of his jury right before waiving it and that any waiver is personal and unequivocal." *United States v. Garrett*, 727 F.2d 1003, 1012 (11th Cir. 1984), *aff'd on other grounds*, 471 U.S. 773 (1985). The rule requiring a written waiver implements the constitutional requirement that any waiver of the right to trial by jury be made knowingly and intelligently by the defendant himself.

B. The Waiver of the Right to a Special Verdict Under Rule 31(e) Must Be the Express and Intelligent Relinquishment of a Known Right.

The appropriate standard for a waiver of the right to a special verdict under Rule 31(e) should be considered in light of the history and function of the rule. Rule 31(e) confers an independent statutory right, but it also carries forward a common law tradition stretching back more than 300 years, a tradition that evolved as a significant protection to the accused when the government sought to strip him of his property in the course of a criminal proceeding. Even if this Court chooses not to reach the constitutional issue, it is plain that Rule 31(e) expresses a fundamental judgment about the safeguards that are necessary when the government seeks to impose forfeiture as well as imprisonment on an accused.

Given the fundamental importance of the procedural protection afforded by Rule 31(e), nothing less than a knowing

and intelligent waiver should be sufficient to extinguish the right to a jury determination under this rule. Whether assessed as a common law, statutory, or constitutional right, the function of the special jury verdict under Rule 31(e) is the same. The requirement that all criminal forfeiture claims be submitted to a lay jury provides an important protection against an overzealous or corrupt prosecution. As the Seventh Circuit correctly recognized, the character of the interest protected by Rule 31(e) is so fundamental that a knowing and intelligent waiver standard is appropriate. *United States v. Robinson*, 8 F.3d 418, 421 (7th Cir. 1993).

Two other provisions in the Federal Rules, Rule 11(c)(4) and Rule 23(a), provide additional support for the view that the waiver of the right to a jury determination of forfeiture under Rule 31(e) must be the intentional relinquishment of a known right. Rule 11(c)(4) directs the court to advise a defendant that if it accepts a plea of guilty "there will not be a further trial *of any kind*." (Emphasis added). In light of the right to a jury determination of forfeiture, Rule 11(c)(4) requires that the defendant whose property may be subject to forfeiture be advised of his rights under Rule 31(e), as well as his right to a jury verdict on his guilt or innocence, before he enters his plea. Rule 23(a) also supports the view that a waiver of Rule 31(e) must be knowing and intelligent. The requirement in Rule 23(a) of an explicit personal waiver of the right to jury trial carried forward the existing federal practice, and that practice should apply to the right to a special jury verdict under Rule 31(e). To be sure, Rule 23(a) does not explicitly refer to criminal forfeiture, but it was adopted in 1945, long before the 1970 legislation reviving criminal forfeiture.

C. Neither the Plea Agreement Nor the Court's Comments Informed Petitioner of His Right to a Jury Trial and Special Verdict on Forfeiture, and Petitioner Made No Knowing and Intelligent Waiver of this Right.

The plea agreement acknowledged petitioner's waiver of "various constitutional rights, including the right to a jury

trial," J.A. 80, and the court advised petitioner that his plea would mean the end of the trial, which had commenced several days earlier. J.A. 87. In most cases, that would have been sufficient to dispose of any jury trial issue. In the instant case, however, petitioner had a right not only to have a jury determination of the issue of guilt or innocence, but also a right to have a jury trial and special verdict on the forfeiture issues. His Sixth Amendment right to a jury determination of forfeiture was supplemented by the statutory right to a special verdict under Rule 31(e).

The record contains no indication that petitioner was made aware of his right to a jury trial and special verdict on the forfeiture issues, and equally no indication that he knowingly waived that right. The plea agreement made no mention of the right to a jury determination of criminal forfeiture or a waiver of that right. (To the contrary, as discussed above, *supra* pp. 22-23, the agreement seems to contemplate further proceedings to determine which of petitioner's assets were tainted, though there was no indication of the mechanism for that determination.) The waiver of a jury determination of forfeiture was neither implicitly nor explicitly part of petitioner's guilty plea. A defendant may plead guilty but nonetheless avail himself of the right to contest the forfeiture issues before the jury. *See, e.g., United States v. McKeithen*, 822 F.2d 310 (2d Cir. 1987). In pleading guilty petitioner had two choices: to concede both his guilt and the forfeitability of his assets, or to concede his guilt but to contest the forfeitability of some or all of his assets before the jury. While the first choice would require a waiver of his rights under Rule 31(e), the second would not.

The court's comments at the plea hearing directed petitioner's attention solely to the fact that his plea would waive his right to a jury determination of guilt or innocence. The court noted that a guilty plea would "be the end of this trial," with the result that "the jury is not going to decide whether you're guilty or not." J.A. 87. The court also noted that it would dismiss the jurors, and "that will be that." *Id.* If anything, these comments erroneously suggested that the

jury's function was exclusively to determine guilt or innocence, and that this determination was the only right petitioner was waiving.

Since the record provides no indication that petitioner knowingly relinquished his right to a jury determination of forfeiture under Rule 31(e), he made no valid waiver and his rights under Rule 31(e) were not extinguished by his plea. Accordingly, the district court erred in entering the order of forfeiture, and the court of appeals erred in affirming that order.

CONCLUSION

The judgment of the court of appeals for the Tenth Circuit should be reversed. The case should be remanded for further proceedings in which the district court inquires into the factual basis for the forfeiture component of petitioner's plea and determines whether petitioner knowingly waives his right to a special jury verdict on forfeiture.

Respectfully submitted,

Of Counsel:
PAUL K. SUN, JR.
SMITH HELMS MULLISS & MOORE, L.L.P.
316 West Edenton Street
Post Office Box 27525
Raleigh, North Carolina 27611
Telephone: 919-755-8720

SARA SUN BEALE
(Appointed by this Court)
Counsel of Record
Duke University School of Law
Science Drive & Towerview Road
Post Office Box 90360
Durham, North Carolina 27708-0360
Telephone: 919-613-7091
Counsel for Petitioner

APPENDIX

21 U.S.C. § 853 provides, in pertinent part:

(a) Property subject to criminal forfeiture. Any person convicted of a violation of this title or title III punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law –

> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
>
> (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

. . . .

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is

the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented

at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that –

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

. . . .

(p) If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant –

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

Fed. R. Crim. P. 7(c)(2) provides:

(2) Criminal Forfeiture. No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

Fed. R. Crim. P. 11 provides in pertinent part:

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

. . . .

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial. . . .

. . . .

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

Fed. R. Crim. P. 23(a) provides:

(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

Fed. R. Crim. P. 31(e) provides:

(e) Criminal Forfeiture. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

Fed. R. Crim. P. 32(d) provides:

(d) Judgment.

(1) In General. A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(2) Criminal Forfeiture. When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.

(7)

SUPREME COURT, U.S.
FILED
AUG 4 1995

No. 94-7427

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOSEPH V. LIBRETTI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

64 pp

QUESTIONS PRESENTED

1. Whether Federal Rule of Criminal Procedure 11(f) requires a district court to determine whether there is a "factual basis" for a stipulation, contained in a plea agreement, regarding the scope of property subject to criminal forfeiture.

2. Whether the order of forfeiture entered in this case was invalid because petitioner had not been specifically informed of his right to have a jury determine the scope of forfeitable assets.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutes and rules involved	2
Statement	2
Summary of argument	13
Argument:	
I. Rule 11(f) does not apply to a stipulation, contained in a plea agreement, that particular assets are subject to criminal forfeiture	15
A. A guilty plea admits the commission of an offense rather than the appropriateness of a particular sentence	15
B. Criminal forfeiture is an element of the sentence, rather than of a substantive offense	19
C. Rules 7(c)(2), 31, and 32 do not establish that the district court must find a factual basis under Rule 11(f) for a forfeiture agreement	24
D. Imposition of a "factual basis" requirement is neither necessary nor appropriate to prevent potential abuses of forfeiture agreements	29
E. A "factual basis" determination for forfeiture stipulations is not related to protecting the knowing and voluntary nature of a guilty plea	35
II. Petitioner's forfeiture stipulation waived the right to a jury determination on forfeiture issues	37
A. The Sixth Amendment does not protect the right to a jury trial on forfeiture	39
B. The right under Rule 31(e) to a jury trial on forfeiture issues was waived by petitioner's agreement to forfeit his assets	41
Conclusion	50
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Acevedo-Ramos v. *United States*, 961 F.2d 305 (1st Cir.), cert. denied, 113 S. Ct. 299 (1992)	47

Cases—Continued: Page

Adams v. *Peterson*, 968 F.2d 835 (9th Cir. 1992), cert. denied, 113 S. Ct. 1818 (1993) 31
Alexander v. *United States*, 113 S. Ct. 2766 (1993) 22
American Hospital Ass'n v. *NLRB*, 499 U.S. 606 (1991) 26
Baxter v. *United States*, 966 F.2d 387 (8th Cir. 1992) ... 47
Blackledge v. *Allison*, 431 U.S. 63 (1977) 18
Boykin v. *Alabama*, 395 U.S. 238 (1969) 42, 45
Brady v. *United States*, 397 U.S. 742 (1970) 16, 44
Cabana v. *Bullock*, 474 U.S. 376 (1986) 39
Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) 40
Caplin & Drysdale, Chartered v. *United States*, 491 U.S. 617 (1989) 22, 23, 29, 35
Clemons v. *Mississippi*, 494 U.S. 738 (1990) 41
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 39
FDIC v. *St. Paul Fire & Marine Ins. Co.*, 942 F.2d 1032 (6th Cir. 1991) 32
Faretta v. *California*, 422 U.S. 806 (1975) 48
Henderson v. *Morgan*, 426 U.S. 637 (1976) 16
Henry v. *Mississippi*, 379 U.S. 443 (1965) 48
Hildwin v. *Florida*, 490 U.S. 638 (1989) 41
Hill v. *Lockhart*, 474 U.S. 52 (1985) 48
Johnson v. *Zerbst*, 304 U.S. 458 (1938) 14, 38, 45
Lebowitz v. *United States*, 877 F.2d 207 (2d Cir. 1989) . 47
McCarthy v. *United States*, 394 U.S. 459 (1969).. 15, 16, 42, 45
McMillan v. *Pennsylvania*, 477 U.S. 79 (1986) 20, 39
Murray v. *Carrier*, 477 U.S. 478 (1986) 48
NLRB v. *Health Care & Retirement Corp. of America*, 114 S. Ct. 1778 (1994) 26
North Carolina v. *Alford*, 400 U.S. 25 (1970) 15
Parke v. *Raley*, 113 S. Ct. 517 (1992) 45
Patterson v. *New York*, 432 U.S. 197 (1977) 20
People v. *Barrows*, 99 N.W.2d 347 (Mich. 1959) 17
Peretz v. *United States*, 501 U.S. 923 (1991) 47

Cases—Continued: Page

Pierce v. *Underwood*, 487 U.S. 552 (1988) 27
Santobello v. *New York*, 404 U.S. 257 (1971) 16, 33, 49
Shannon v. *United States*, 114 S. Ct. 2419 (1994) 27
Singer v. *United States*, 380 U.S. 24 (1965) 44
Sinicropi v. *Milone*, 915 F.2d 66 (2d Cir. 1990) 32
Smith v. *United States*, 876 F.2d 655 (8th Cir.), cert. denied, 493 U.S. 869 (1989) 46
Sullivan v. *Louisiana*, 113 S. Ct. 2078 (1993) 20, 21
Taylor v. *Illinois*, 484 U.S. 400 (1988) 48
The Palmyra, 25 U.S. (12 Wheat.) 1 (1827) 40
Tiemens v. *United States*, 724 F.2d 928 (11th Cir.), cert. denied, 469 U.S. 837 (1984) 46
Tollett v. *Henderson*, 411 U.S. 258 (1973) 46
Tome v. *United States*, 115 S. Ct. 696 (1995) 26
Town of Newton v. *Rumery*, 480 U.S. 386 (1987) 31
United States v. *Adams*, 961 F.2d 505 (5th Cir. 1992) . 19
United States v. *Allen*, 804 F.2d 244 (3d Cir. 1986), cert. denied, 480 U.S. 922 (1987) 19
United States v. *Armstrong*, 951 F.2d 626 (5th Cir. 1992) 19
United States v. *Ben-Hur*, 20 F.3d 313 (7th Cir. 1994) . 22
United States v. *Benchimol*, 471 U.S. 453 (1985) 33
United States v. *Bernaugh*, 969 F.2d 858 (10th Cir. 1992) 19
United States v. *Bieri*, 21 F.3d 819 (8th Cir.), cert. denied, 115 S. Ct. 208 (1994) 21, 22
United States v. *Boatner*, 966 F.2d 1575 (11th Cir. 1992) 11
United States v. *Broce*, 488 U.S. 563 (1989) 16, 46, 48
United States v. *DeFusco*, 949 F.2d 114 (4th Cir. 1991), cert. denied, 503 U.S. 997 (1992) 19
United States v. *$8,850*, 461 U.S. 555 (1983) 22
United States v. *Elgersma*, 971 F.2d 690 (11th Cir. 1992) 22
United States v. *Fernandez*, 960 F.2d 771 (9th Cir. 1992) 34

Cases—Continued: Page

United States v. *Gagnon*, 470 U.S. 522 (1985) 47
United States v. *Gaudin*, No. 94-514 (June 19, 1995) 21, 39
United States v. *Goldberg*, 862 F.2d 101 (6th Cir. 1988) 19
United States v. *Grammatikos*, 633 F.2d 1013 (2d Cir. 1980) 22
United States v. *Grande*, 620 F.2d 1026 (4th Cir.), cert. denied, 449 U.S. 830, 919 (1980) 40
United States v. *Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989), cert. denied, 497 U.S. 1003 (1990) 22
United States v. *Investment Enterprises, Inc.*, 10 F.3d 263 (5th Cir. 1993) 32
United States v. *Ivory*, 11 F.3d 1411 (7th Cir. 1993) 19
United States v. *Lavin*, 27 F.3d 40 (2d Cir.), cert. denied, 115 S. Ct. 453 (1994) 32
United States v. *Lyons*, 898 F.2d 210 (1st Cir.), cert. denied, 498 U.S. 920 (1990) 31
United States v. *Mezzanatto*, 115 S. Ct. 797 (1995) 30, 31, 33, 38
United States v. *Morrow*, 914 F.2d 608 (4th Cir. 1990) . 19
United States v. *Olano*, 113 S. Ct. 1770 (1993) 45
United States v. *Pelullo*, 14 F.3d 881 (3d Cir. 1994) 22
United States v. *Piper*, 35 F.3d 611 (1st Cir. 1994), cert. denied, 115 S. Ct. 1118 (1995) 18
United States v. *Price*, 361 U.S. 304 (1960) 25
United States v. *Ray*, 828 F.2d 399 (7th Cir. 1987), cert. denied, 484 U.S. 964, 1045 (1988) 19
United States v. *Reyes*, 13 F.3d 638 (2d Cir. 1994) 18
United States v. *Robinson*, 8 F.3d 418 (7th Cir. 1993) ... 48
United States v. *Saccoccia*, Nos. 93-1618, *et al.* (1st Cir. June 28, 1995) 22
United States v. *Sandini*, 816 F.2d 869 (3d Cir. 1987) 22, 40
United States v. *Shapiro*, 879 F.2d 468 (9th Cir. 1989) . 31
United States v. *Smith*, 966 F.2d 1045 (6th Cir. 1992) .. 22
United States v. *Washington*, 969 F.2d 1073 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1287 (1993) 19

Cases—Continued: Page

United States v. *Wenger*, No. 93-4043 (7th Cir. June 15, 1995) 49
United States v. *X-Citement Video, Inc.*, 115 S. Ct. 464 (1994) 25
United States v. *Zang*, 703 F.2d 1186 (10th Cir. 1982), cert. denied, 464 U.S. 828 (1983) 47-48
United States v. *Zweber*, 913 F.2d 705 (9th Cir. 1990) .
Walton v. *Arizona*, 497 U.S. 639 (1990) 41
Yakus v. *United States*, 321 U.S. 414 (1944) 45

Constitution, statutes and rules:

U.S. Const.:
Art. III 47
Amend. IV 46
Amend. V 21
Double Jeopardy Clause 46
Due Process Clause 46
Amend. VI 12, 21, 22, 23, 39, 44, 46
Amend. VIII (Excessive Fines Clause) 13
Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976 ..... 13, 20
Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408(a)(2), 84 Stat. 1265-1266 24
Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, § 3(5), 89 Stat. 371 42
Jencks Act, 18 U.S.C. 3500 47
Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 943 24
Rules Enabling Act, 28 U.S.C. 2071 *et seq.*:
28 U.S.C. 2072 (1988 & Supp. V 1993) 26
28 U.S.C. 2074 26
Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.* 47
18 U.S.C. 2(b) 2
18 U.S.C. 922(o)(1) 2
18 U.S.C. 924(c) 2
18 U.S.C. 924(c)(1) 2

Statutes and rules—Continued: Page

18 U.S.C. 1503 2
18 U.S.C. 1952(a)(3) 2
18 U.S.C. 1956(a)(1)(B)(i) 2
18 U.S.C. 3663(a)(3) (Supp. V 1993) 31
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 ..... 2, 19
21 U.S.C. 848 (1988 & Supp. V 1993) 2, 19, 23
21 U.S.C 848(a) 3, 9, 20
21 U.S.C. 853 ..... 2, 11, 19, 31, 41
21 U.S.C. 853(a) 3, 9, 21, 23
21 U.S.C. 853(a)(3) 3
21 U.S.C. 853(e) 4
21 U.S.C. 853(n) 34
21 U.S.C. 853(n)(6)(A)-(B) 10
21 U.S.C. 853(p) 3, 8, 33
21 U.S.C. 854 2
21 U.S.C. 960(b) (1988 & Supp. V 1993) 18
21 U.S.C. 963 18
Fed. R. Crim. P:
Rule 7 ..... 2, 24, 25, 27
Rule 7(c)(2) 3, 13, 24, 26
Rule 11 ..... *passim*
advisory committee's note 16, 17, 18, 26, 34
Rule 11(c) 42, 48, 49
94 S. Ct. 3279 (1974) 42
Rule 11(c)(1) 43
Rule 11(c)(3) 42, 43
Rule 11(e)(1)(C) 34
Rule 11(e)(4) 34
Rule 11(e)(6) 31
Rule 11(f) ..... *passim*
Rule 16 47
Rule 23 ..... 2, 44
advisory committee's note 44
Rule 23(a) 44
Rule 23(c) 44

Rules—Continued: Page

Rule 31 ..... 2, 24, 25, 27, 29
advisory committee's note 25
Rule 31(e) ..... *passim*
Rule 32 ..... 2, 24, 25, 27, 29, 44
Rule 32(d)(2) 13, 25, 26
Rule 43 47
Fed. R. Evid. 410 31
Sentencing Guidelines (Nov. 1, 1994):
§ 5E1.2(c) 9
§ 5E1.2(i) 30
§ 5E1.4 32
§ 6B1.3 34
§ 6B1.4 (Commentary) 32
§ 6B1.4(a) 31
§ 6B1.4(d) 32

Miscellaneous:

H.R. Rep. No. 247, 94th Cong., 1st Sess. (1973) 42
Note, *A Proposal To Reform Criminal Forfeiture Under RICO and CCE*, 97 Harv. L. Rev. 1929 (1984) ... 40
S. Rep. No. 617, 91st Cong., 1st Sess. (1969) 28
S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 21, 28

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-7427

JOSEPH V. LIBRETTI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 313-329) is reported at 38 F.3d 523.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1994. J.A. 313. The petition for a writ of certiorari was filed on December 27, 1994, and was granted on March 27, 1995 (J.A. 330). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

Federal Rules of Criminal Procedure 7, 11, 23, 31, and 32, and 21 U.S.C. 848 and 853, are reprinted in pertinent part at App., *infra*, 1a-5a.

STATEMENT

After entering a guilty plea in the United States District Court for the District of Wyoming, petitioner was convicted of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (1988 & Supp. V 1993). He was sentenced to 20 years' imprisonment, to be followed by five years of supervised release. He was also fined $5,000 and ordered to forfeit certain property. The court of appeals affirmed. J.A. 313-329.

1. On May 22, 1992, a federal grand jury returned an 11-count superseding indictment, charging petitioner with violations of the federal drug, firearms, and money laundering laws. J.A. 38-71.[1] Conviction on Counts 2 and 6 alone would have carried a minimum total sentence of 50 years' imprisonment. See 18 U.S.C. 924(c)(1) (mandatory minimum sentence of 30 years' imprisonment for use of firearm equipped with silencer, to be imposed

[1] Petitioner was charged with conspiring to distribute cocaine and marijuana, and to possess cocaine and marijuana with intent to distribute them, in violation of 21 U.S.C. 846 (Count 1); using or carrying firearms and silencers during and in relation to the drug conspiracy, in violation of 18 U.S.C. 924(c) (Count 2); traveling in interstate commerce to facilitate drug trafficking, in violation of 18 U.S.C. 1952(a)(3) (Count 3); possession of a machine gun, in violation of 18 U.S.C. 922(*o*)(1) (Count 4); investment of illegal drug proceeds, in violation of 21 U.S.C. 854 (Count 5); operating a CCE, in violation of 21 U.S.C. 848 (Count 6); money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i), 18 U.S.C. 2(b) (Counts 7-8); obstruction of justice, in violation of 18 U.S.C. 1503 (Counts 9-10); and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 11).

consecutive to any other term of imprisonment); 21 U.S.C. 848(a) (mandatory minimum sentence of 20 years' imprisonment for CCE offense); see J.A. 325. The drug offenses also carried potential fines of up to $2 million, 21 U.S.C. 848(a), or twice the gross profits or proceeds, 21 U.S.C. 853(a).

The charged drug offenses further provided for an order of forfeiture to be imposed at sentencing. Section 853(a) of Title 21 provides that a person convicted of a felony drug offense "shall forfeit * * * any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of" his offense, as well as "any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of," his offense. For persons convicted of engaging in a CCE, the statute provides for additional forfeiture of the person's "interest in, claims against, and property or contractual rights affording a source of control over" the CCE. 21 U.S.C. 853(a)(3). Section 853(p) further provides that where property subject to forfeiture under Section 853(a) cannot be recovered by the government, "the court shall order the forfeiture of any other property of the defendant up to the value of" the forfeitable but unrecoverable assets.

Pursuant to those provisions and Rule 7(c)(2) of the Federal Rules of Criminal Procedure, the indictment alleged that, "[u]pon the conviction of [petitioner] for engaging in a [CCE] as charged in * * * Count [6]," the government was entitled to forfeiture of the property that was obtained from or used to facilitate petitioner's drug offenses, "including but not limited to" various specified assets. J.A. 64; see J.A. 64-67 (listing assets). Additional assets alleged to be subject to forfeiture were subsequently identified in a restraining order issued and

later amended by the district court under 21 U.S.C. 853(e). See J.A. 72-78.[2]

On September 28, 1992, petitioner's jury trial began. During the first week of trial, the government called 18 witnesses, nine of whom had purchased cocaine from petitioner, and five of whom were themselves drug dealers whom petitioner supplied and supervised while he was living in Colorado and Wyoming. Those witnesses testified that they had bought multi-ounce quantities of cocaine from petitioner, at prices ranging from $1,600 to $1,800 per ounce, on a weekly or monthly basis over periods of several months or years. See, *e.g.*, 9/29/92 Trial Tr. 124-126; 10/1/92 Trial Tr. 495-501; 10/2/92 Trial Tr. 946-949. Petitioner advised and assisted the drug dealers operating under him, counseling them to store cocaine and cash in bank safety deposit boxes, 10/1/92 Trial Tr. 503-505; helping them steal from customers who owed money, *id.* at 713-716; and generally "impos[ing] his ideology upon [them] * * * to provide a quality product," 10/2/92 Trial Tr. 949. Indeed, petitioner's attorney acknowledged in his opening statement that the government's evidence would show that petitioner "got involved in the use of drugs" and "with a little bit of sales," and that he ultimately "advanced to [be] a pretty big salesman" in cocaine and marijuana. 9/29/92 Def.'s Op. Stmt. Tr. 5.

Petitioner's drug profits enabled him to acquire expensive assets at a time when he had only modest sources of legitimate income. In the fall of 1985, just after graduating from college and while earning an annual salary

[2] Section 853(e) provides, in relevant part, that, "[u]pon application of the United States, the court may enter a restraining order * * * to preserve the availability of property described in subsection (a) of this section for forfeiture under this section."

of approximately $20,000, petitioner bought a $200,000 home with a down payment of $100,000. See 9/29/92 Trial Tr. 121-122, 179-180, 207-222; 10/2/92 Trial Tr. 922; Presentence Report (PSR) ¶ 37. He installed two large safes in the basement of the house, and he kept cocaine, weapons, and as much as $20,000 in cash in the safes or in other parts of the home. 9/29/92 Trial Tr. 57, 137-142; 10/1/92 Trial Tr. 735-744. Petitioner also became a federal firearms dealer and bought dozens of automatic and semi-automatic weapons, later determined to be worth at least $243,000. See, *e.g.*, 9/29/92 Trial Tr. 140-141, 156-162; 10/1/92 Trial Tr. 542-545; 10/2/92 Trial Tr. 844-853, 903-906; J.A. 123. In 1990, petitioner bought a Toyota Celica with a check for $19,114. 10/2/92 Trial Tr. 912-913.

Petitioner saved much of his profits, however, storing cash, cashier's checks, and drugs in safety deposit boxes and storage facilities away from his home. See 9/29/92 Trial Tr. 155-156; 10/1/92 Trial Tr. 503-505, 718-720. In 1987, one of petitioner's drug customers broke into one of petitioner's rooms at a storage facility: he found a briefcase containing approximately $150,000 in hundred dollar bills; a large block of cocaine; and five 30-gallon trash bags, at least one of which was filled with marijuana. 10/1/92 Trial Tr. 559-566, 588-589. In an interview with the Lakewood, Colorado, Police Department, petitioner admitted that he owned the cocaine, cash, and marijuana in the storage locker. 9/29/92 Trial Tr. 18-19, 34-35. In 1988, petitioner boasted to his ex-girlfriend that he had $250,000 in cash stored in safety deposit boxes, and that some of the safety deposit boxes were in his brothers' names. 10/2/92 Trial Tr. 831, 833-835.

2. At the end of the first week of trial, petitioner entered into a plea agreement with the government. The agreement provided that petitioner would plead guilty to engaging in a CCE, as charged in Count 6 of the

indictment. In return, the government agreed not to file additional charges against him, and to recommend the mandatory minimum prison term of 20 years. J.A. 79-80, 85. Petitioner further agreed

> to transfer his right, title, and interest in all of his assets to the Division of Criminal Investigation of the Wyoming Attorney General including, but not limited to: all real estate; all personal property, including guns, the computer, and every other item now in the possession of the United States; all bank accounts, investments, retirement accounts, cash, cashier's checks, traveler's checks and funds of any kind.

J.A. 81. Petitioner also "acknowledge[d] that by pleading guilty to Count Six of the Indictment, he waives various constitutional rights, including the right to a jury trial." J.A. 80.

At the change of plea hearing, the district court advised petitioner of his rights, including his "right to a speedy and public jury trial, which we're in the middle of." J.A. 86. The court explained to petitioner that if he pleaded guilty, "it's going to be the end of this trial," and "the jury is not going to decide whether you're guilty or not. I'll dismiss them after this, and that will be that." J.A. 87. The court also explained "the consequences of [petitioner's] plea," including the fact that he "could be fined $2 million" and that "all the property that's described in this Count 6 could be forfeited to the United States." J.A. 88.

The court asked petitioner whether he understood the consequences of his plea, and petitioner stated: "There is only one part I didn't understand. They said that they can take up to one and a half million dollars from me at any time. Let's say 20 years from now I get a job, I get a paycheck. They can come and take that?" J.A. 88.

After consulting with petitioner's attorney, the court explained that the forfeiture was limited to tainted assets, and that petitioner's future legitimate income would not be forfeited. J.A. 88-89.

The court then explained to petitioner that "I will have to question you as to whether or not your guilty plea is a voluntary plea and whether or not there's a factual basis for the plea." J.A. 89. The court read aloud the 26 paragraphs of Count 6 of the indictment. J.A. 90-97. The court also read aloud the provisions of Count 6 describing the property alleged to be forfeitable. J.A. 97-98. Petitioner confirmed under oath that he understood the indictment and the plea agreement, and specifically that he understood "that all of [his] property could be forfeited, the property that is owned by [him] by reason of any drug transaction." J.A. 100. Petitioner pleaded guilty to Count 6. J.A. 99. The district court found "that the plea of guilty is * * * voluntary," and that "there is a factual basis for the guilty plea." J.A. 121.

3. a. Before sentencing, the government filed a "Prosecutor's Statement" outlining petitioner's illegal activities and describing some of the assets that he had purchased with the proceeds of his crimes. J.A. 122-135.[3]

---

[3] In particular, the Prosecutor's Statement reported that petitioner had used $72,000 in drug proceeds to pay for his house in Lakewood, Colorado; used $20,000 in drug proceeds to buy a GNMA mortgage certificate as an investment; used $243,000 in drug proceeds to buy automatic and semi-automatic firearms and silencers; maintained hundreds of thousands of dollars in cash in storage lockers and bank safety deposit boxes, and in bank accounts in the names of his relatives; and laundered drug proceeds through his firearms business and by purchasing cashier's checks, automobiles, real property, and other investments. Finally, the Statement outlined other sums of money petitioner had earned from his drug dealing, including $68,000 in cash found in safety deposit boxes and other locations, and more than

The Presentence Report (PSR) detailed petitioner's legitimate employment and earnings record during the same time period. Between his graduation from college in 1985 and his arrest in 1991, petitioner earned no more than $50,000 per year and typically earned much less. PSR ¶¶ 35-37.[4] Petitioner conceded that the PSR's "report of [his] background, education, [and] financial circumstances are [*sic*] accurate." J.A. 138.

At the sentencing hearing held on December 23, 1992, the government filed a motion for forfeiture of all of petitioner's known assets. J.A. 136-154. Defense counsel offered no objection to that motion, asserting that the forfeiture statute was "a harsh law" and "a bitter pill dealt by Congress," but conceding that it was "a pill we must swallow." J.A. 149. Counsel acknowledged that, "as a result of [petitioner's crime], the forfeiture is going to take regular money and illegal money under the substitute assets" provision of the forfeiture statute, 21 U.S.C. 853(p). J.A. 149. The court granted the motion, issuing an order of forfeiture that day. J.A. 150, 155-164.

The forfeiture order stated that it was based on petitioner's "agree[ment] to the forfeiture of any right,

---

$100,000 in additional cash that the authorities never recovered. J.A. 122-135. Petitioner's drug dealing profits were estimated to be in excess of $1 million. J.A. 237-238 (government witness's testimony in post-judgment proceedings).

[4] During 1985 and 1986, petitioner earned approximately $20,000 per year managing a restaurant and a grocery store. In 1987, petitioner worked as a temporary stockbroker, being paid on commission only, and then managed a thrift store for the remainder of the year. In 1988, petitioner was involved in a real estate transaction that resulted in a loss. In 1989, petitioner claimed that he earned $50,000 per year operating his firearms business. From June 1, 1989, until his arrest on December 4, 1991, the PSR stated, petitioner earned approximately $40,000 per year in legitimate activities. PSR ¶¶ 35-37.

title and interest as to him, as to all such property described" in the order; in particular, the order relied on petitioner's "plea agreement * * * in which [he] agreed to forfeit all property." J.A. 155. The order called for forfeiture of three pieces of real property, two automobiles, a mobile home, several firearms, bank accounts, cashier's checks, traveler's checks, bonds, GNMA certificates, and a diamond ring. J.A. 155-164. One check was forfeited as a substitute asset. J.A. 162. Every item forfeited either had been seized by the government before petitioner's trial or had been identified in the restraining order and its two amendments, the last of which was issued by the district court three weeks before the plea agreement was signed. See, *e.g.*, J.A. 25-37, 74-78 (restraining order and amendment).[5] The total value of the forfeited property was approximately $410,000. See J.A. 329.

As the government had recommended in the plea agreement, the district court sentenced petitioner for his CCE offense to the statutory minimum term of 20 years' imprisonment, to be followed by five years' supervised release. J.A. 152. The court also imposed a $5,000 fine, J.A. 153, which was far less than the applicable statutory maximum and recommended range under the Sentencing Guidelines. See 21 U.S.C. 848(a), 853(a) (establishing maximum fine of the greater of $2 million or "twice the gross profits or other proceeds" that petitioner derived from his CCE); Guidelines § 5E1.2(c) (fine

---

[5] Two bank accounts in the forfeiture order, Items (U) and (V), had not been previously identified in the restraining order or its amendments. The court later determined that those accounts were owned by petitioner's parents, and the court ordered them returned. J.A. 310. The court also ordered Item (G), a diamond ring, returned to petitioner's girlfriend, Claudia Porter. *Ibid.*

range for petitioner was from $25,000 to the statutory maximum). Although the court found that "some fine is necessary," in light of the "large quantities of drugs involved in this case," the court took into account "that there has been a forfeiture of almost all of the illicit gains that [petitioner] achieved." J.A. 152.

After the court had imposed the sentence, petitioner asked, "Are we over?" The court answered, "I think so," and petitioner stated: "Well, then, with that in mind, I would just like to object to what I see as a failure to find any factual basis for the whole forfeiture, just for the record." J.A. 154. The court noted the objection, but explained that "the evidence that I heard before me in the two days of trial I think is sufficient to warrant the granting of forfeiture. I think I have no alternative." *Ibid*. On December 29, 1992, petitioner filed a notice of appeal from the forfeiture order. J.A. 3.

b. While the case was pending before the court of appeals, notice was published of the forfeiture. The district court then entertained third party claims to some of the forfeited property, resolved disputes about ownership, and ordered certain property returned. J.A. 299-308, 310, 316; see 21 U.S.C. 853(n)(6)(A)-(B). On April 2, 1993, the court also modified its forfeiture order with respect to petitioner, determining "that it may be unjust to enforce the specific forfeiture provisions in the plea agreement." J.A. 309. The court stated that "a defendant's concession in a plea agreement to the forfeiture of his property does not make it so," and ordered "the Magistrate [to] conduct a fact finding hearing in which [petitioner] is given an opportunity to show by a preponderance of the evidence that his property is not subject to forfeiture." J.A. 309-310 (citation and internal quotation marks omitted). On June 7, 1993, the district court granted the government's motion to stay proceedings before the magistrate judge pending the disposition of petitioner's appeal. Gov't C.A. Br. 12.

4. The court of appeals affirmed. J.A. 313-329. The court first held that, during the pendency of the appeal, the district court had correctly exercised "jurisdiction to consider third party claims to property," but that the court "lack[ed] jurisdiction to consider [petitioner's] claims" to the forfeited property. J.A. 318-319.

The court then rejected petitioner's contention that the district court had violated Federal Rule of Criminal Procedure 11(f) by failing to satisfy itself that there was a factual basis for the forfeiture. Noting that "[t]he parties both acknowledge that criminal forfeiture under § 853 is a part of the sentence, not a part of the substantive offense," J.A. 322; see also J.A. 318, the court held that "a sentencing judge is not required under Rule 11 to determine whether there is a factual basis for a defendant's concession to a criminal forfeiture pursuant to his plea bargain with the government," because "Rule 11(f) only applies to the guilty plea," not to the sentence imposed pursuant to that plea. J.A. 321-322 (quoting *United States* v. *Boatner*, 966 F.2d 1575, 1581 (11th Cir. 1992)).

The court also rejected petitioner's argument that the plea agreement was "ambiguous and vague," J.A. 323, with respect to the scope of the property stipulated to be forfeitable. The court explained that petitioner had "unambiguously forfeited all of his property," J.A. 325, and that he "intended to forfeit all of his property without requiring the government to prove the assets were forfeitable," J.A. 324. The court acknowledged that some of petitioner's assets "on their face had no connection with his drug dealings," J.A. 325, but observed that property subject to forfeiture under 21 U.S.C. 853

"includes forfeitable assets under § 853(a) and substitute assets under § 853(p)," J.A. 324-325.

The court noted that petitioner had "received a favorable plea agreement." J.A. 325. Petitioner had entered into the agreement only "after the government presented overwhelming evidence of his guilt" during the first week of trial, and he thereby avoided conviction on firearms charges that would have carried a mandatory minimum "thirty-year sentence consecutive to the sentence on the underlying [CCE] offense." *Ibid.* Thus, the court explained, petitioner was "seek[ing] the benefit of [his] bargain, but only to the extent it favors him." *Ibid.* The court held that it would "not require the government to undergo a fact-finding hearing and forego [*sic*] a substantial benefit of its bargain" with petitioner. *Ibid.*

Finally, the court rejected petitioner's claim that "he was not advised of and did not waive his right to a jury trial on forfeiture issues." J.A. 326. The court of appeals noted that the absence of a Sixth Amendment right to have punishment determined by a jury "suggests that [petitioner] does not have a *constitutional* right to a jury trial at the forfeiture stage of these proceedings." J.A. 326. The court concluded, however, that it "need not decide" whether petitioner had a constitutional right to a jury trial on forfeiture "because constitutional rights can be waived, and because a defendant does have a *statutory* right, pursuant to Fed.R.Crim.P. 31(e), to have a jury determine which of his assets may be forfeited. Thus, we must determine whether [petitioner] waived his right to a jury trial." J.A. 327 (citation omitted). Based on its examination of the record, the court held that petitioner had waived his right to a jury trial on the issue of forfeiture. See J.A. 327-328. In particular, the court noted that "there is no evidence at [the change of plea] hearing that [petitioner] wanted a jury trial on the forfeiture issue, or thought he was going to have one." J.A. 328.[6]

SUMMARY OF ARGUMENT

I. Federal Rule of Criminal Procedure 11(f) requires a district court to satisfy itself that there is a "factual basis" for a criminal defendant's "plea of guilty." That provision has no application to admissions or stipulations that are relevant to sentencing but not to the defendant's guilt of the substantive offense. Forfeiture of particular assets is properly regarded as part of the punishment for a criminal offense, not as an element of the crime. Both the text and legislative history of the Comprehensive Crime Control Act of 1984 make clear that Congress viewed criminal forfeiture as a penalty, and the courts of appeals have uniformly adopted that characterization. There is also no basis in logic for regarding forfeiture as an element of the CCE offense, since an order of forfeiture is not a prerequisite to conviction of that crime.

Petitioner's principal contention is that criminal forfeiture should be treated as an element of the offense in applying Rule 11(f) because the Federal Rules of Criminal Procedure were amended in 1972 to provide that forfeiture must be alleged in the indictment, submitted to the jury, and separately identified in the judgment. See Fed. R. Crim. P. 7(c)(2), 31(e), and 32(d)(2). That argument is without merit. The premises that underlay the 1972 amendments are of no relevance in construing the "factual basis" requirement, which was

---

[6] The court of appeals also rejected petitioner's contention that the scope of the forfeiture violated the Excessive Fines Clause of the Eighth Amendment, see J.A. 328-329, a claim that petitioner does not press in this Court.

added to Rule 11 in 1966. Nor can the Advisory Committee's Notes on one Rule alter the textual requirements of another. In any event, there is no evidence that, in the promulgation of the amendments, this Court or Congress shared the Advisory Committee's stated view about the nature of forfeiture. And Congress clearly regarded forfeiture as an aspect of punishment, both before and after the 1972 amendments.

The possibility that forfeiture stipulations may sometimes be misused provides no basis for treating such stipulations as part of a defendant's "plea." The standards generally applicable to sentencing stipulations provide ample protection against overreaching. Although the court is not obligated to accept the facts as stipulated, the premise of an adversary system is that the court resolves disputes between the parties and accords presumptive validity to statements upon which the parties agree.

II. Petitioner's agreement to forfeit all of his assets at sentencing was valid even though he was not specifically informed by the court that Rule 31(e) of the Federal Rules of Criminal Procedure affords a right to a jury verdict "as to the extent of the interest or property subject to forfeiture." The district court determined that petitioner knowingly and voluntarily waived his right to a jury determination on the issue of guilt and that he was aware that the jury would be dismissed; the court had no further obligation to inform petitioner that he had a right to a jury trial on the issue of forfeiture. The Constitution does not provide a right to jury sentencing. And the right to a jury finding on forfeiture under Rule 31(e) is not one of the small category of fundamental rights that requires compliance with the waiver standard of *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Although petitioner was not specifically instructed that he had a right to a jury determination of

forfeiture, his knowing and voluntary agreement about the scope of forfeitable assets was intended to remove any right to dispute that issue—before a jury or otherwise. That waiver of rights was fully valid.

ARGUMENT

I. RULE 11(f) DOES NOT APPLY TO A STIPULATION, CONTAINED IN A PLEA AGREEMENT, THAT PARTICULAR ASSETS ARE SUBJECT TO CRIMINAL FORFEITURE

Rule 11(f) of the Federal Rules of Criminal Procedure states that, "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." A "plea of guilty" constitutes a defendant's admission of guilt of a substantive offense and his waiver of the right to trial on that charge. By contrast, admissions or stipulations that are relevant to sentencing, but not to the defendant's guilt of the substantive offense, are extrinsic to the plea. Because criminal forfeiture is a punishment, not an element of a substantive crime, petitioner's stipulation regarding forfeiture was not subject to the requirements of Rule 11(f).

A. A Guilty Plea Admits The Commission Of An Offense Rather Than The Appropriateness Of A Particular Sentence

1. A guilty plea constitutes "the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind." *North Carolina* v. *Alford*, 400 U.S. 25, 32 (1970). In *McCarthy* v. *United States*, 394 U.S. 459 (1969), the Court explained that "a guilty plea is an admission of all the elements of a formal criminal charge." *Id.* at 466. Applying that definition to Federal Rule of Crimina!

Procedure 11, the Court held that the trial judge could "satisfy himself that there is a factual basis for the plea" by "determin[ing] 'that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.'" 394 U.S. at 467 (quoting Fed. R. Crim. P. 11 advisory committee's note, 18 U.S.C. App. at 739). The Court suggested that the trial judge should "personally address[] the defendant as to his understanding of the essential elements of the charge to which he pleads guilty," at least "where the charge encompasses lesser included offenses." 394 U.S. at 467 n.20; see *id.* at 471. See also *United States* v. *Broce*, 488 U.S. 563, 570 (1989) (a guilty plea is an "admission that [the defendant] committed the crime charged against him," so that a defendant who pleads guilty "is admitting guilt of a substantive crime") (internal quotation marks omitted); *Santobello* v. *New York*, 404 U.S. 257, 261 (1971) (trial judge may satisfy rule "by having the accused describe the conduct that gave rise to the charge"); *Brady* v. *United States*, 397 U.S. 742, 748 (1970); *Henderson* v. *Morgan*, 426 U.S. 637, 648 (1976) (White, J., concurring).

The Advisory Committee's Note to Rule 11(f) confirms that the "factual basis" test applies only to the elements of the offense. The 1966 amendment to Rule 11, which created the "factual basis" requirement, was designed to ensure "that the conduct which the defendant admits constitutes the offense charged." 18 U.S.C. App. at 739. The Advisory Committee explained that the factual basis test would thereby "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *Ibid.* Indicating that the rule was modeled on

a similar requirement in Michigan law, the Committee cited authorities that made clear that the court's obligation was to determine the factual basis for the crime charged. *Ibid.*, citing, *e.g.*, *People* v. *Barrows*, 99 N.W.2d 347, 349 n.1, 350 (Mich. 1959) (quoting Michigan statute that required the judge, "whenever [he] shall have reason to doubt the truth of such plea of guilty, * * * to vacate the same, direct a plea of not guilty to be entered and order a trial of the issues thus formed"; the *Barrows* court noted that the questioning "required by the rule [is] for the purpose of establishing the crime and the participation therein of the person pleading guilty").

An amendment to Rule 11 that took effect in 1975 "retain[ed] the [factual basis] requirement of old rule 11," and codified it as new subsection (f) of the rule. See 18 U.S.C. App. at 743. The Advisory Committee's Note indicated that the requirement may be satisfied "by having the accused describe the conduct that gave rise to the charge," and observed that the Rule "does not speak directly to the issue of whether a judge may accept a plea of guilty where there is a factual basis for the plea *but the defendant asserts his innocence.*" *Ibid.* (emphasis added). That discussion indicates that Rule 11(f)'s "factual basis" inquiry was intended to apply only to charges as to which the defendant could either admit guilt or maintain innocence, *i.e.*, substantive criminal offenses.

2. Although a variety of terms may be included in a single document containing the defendant's agreement to plead guilty, the term "plea of guilty" in Rule 11(f) is not synonymous or coextensive with the concept of a "plea agreement." A "plea agreement" may contain terms separate and distinct from the defendant's admission that he is guilty of the charged offense, including terms relating to the dismissal of related charges, to the

defendant's cooperation, or to sentencing. The factual basis requirement of Rule 11(f) was not intended to apply to such provisions. Indeed, the 1966 version of Rule 11 contained no reference at all to plea agreements, the legitimacy of which was at that time substantially uncertain. See *Blackledge* v. *Allison*, 431 U.S. 63, 76 (1977) ("[I]t was not until our decision in *Santobello* v. *New York*, 404 U.S. 257 [1971], that lingering doubts about the legitimacy of the practice were finally dispelled"); Fed. R. Crim. P. 11 advisory committee's note, 18 U.S.C. App. at 741-742 (1974 Amendment).

The courts of appeals have uniformly held that the requirements of Rule 11(f) apply only to the elements of the offense, and not to other factual issues that may determine a defendant's sentence. In *United States* v. *Reyes*, 13 F.3d 638 (2d Cir. 1994), for example, the defendant pleaded guilty to conspiring to import cocaine, in violation of 21 U.S.C. 963. He later claimed that he should have been allowed to withdraw his plea because "there was an insufficient factual basis," under Rule 11(f), "to establish the nature and quantity of narcotics that [he] was charged with conspiring to import." 13 F.3d at 640. Although the defendant's sentence turned on the quantity of cocaine involved in his offense, see 21 U.S.C. 960(b) (1988 & Supp. V 1993), the Court rejected his reliance on Rule 11(f) because "the quantity of cocaine is not an element of this offense." 13 F.3d at 640.

As the First Circuit recently explained, "[t]hough a district court has an unflagging obligation to assure itself that a guilty plea is grounded on an adequate factual foundation, it need not gratuitously explore points removed from the elements of the offense." *United States* v. *Piper*, 35 F.3d 611, 615-616 (1st Cir. 1994) (citations omitted), cert. denied, 115 S. Ct. 1118 (1995). Thus, for example, a trial court may not "reject a knowing

and voluntary guilty plea [merely] because a defendant refuses to admit to facts external to the essential elements of the offense charged," even if those facts are alleged in the indictment. *United States* v. *Washington*, 969 F.2d 1073, 1077 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1287 (1993). Correspondingly, a defendant may not overturn a guilty plea merely because there is no factual basis for such "external" allegations.[7]

B. Criminal Forfeiture Is An Element Of The Sentence, Rather Than Of A Substantive Offense

Criminal forfeiture pursuant to 21 U.S.C. 848 and 853 is properly regarded as a punishment for conducting a continuing criminal enterprise, rather than as an element of that crime or as a free-standing offense. Thus, the "factual basis" requirement in Rule 11(f) is inapplicable to stipulations regarding forfeiture.

---

[7] See *United States* v. *Ivory*, 11 F.3d 1411, 1415-1416 (7th Cir. 1993) (per curiam) (because 21 U.S.C. 846 "does not require the prosecutor to prove an overt act," "Rule 11 is satisfied if the record provides a factual basis for concluding that [the defendant] agreed to distribute drugs" without showing that he actually did so); *United States* v. *Adams*, 961 F.2d 505, 508 (5th Cir. 1992) (per curiam) ("The record must reveal specific factual allegations supporting each element of the offense."); *United States* v. *Allen*, 804 F.2d 244, 245 (3d Cir. 1986) ("The district court must also find a factual basis for each element of the crime."), cert. denied, 480 U.S. 922 (1987); *United States* v. *Bernaugh*, 969 F.2d 858, 866 (10th Cir. 1992) (discussing Rule 11(f) in terms of the elements of the offense); *United States* v. *Morrow*, 914 F.2d 608, 611-613 (4th Cir. 1990) (same); *United States* v. *Goldberg*, 862 F.2d 101, 104 (6th Cir. 1988) (same); *United States* v. *Ray*, 828 F.2d 399, 406-407 (7th Cir. 1987) (same), cert. denied, 484 U.S. 964, 1045 (1988); cf. *United States* v. *Armstrong*, 951 F.2d 626, 629 (5th Cir. 1992) (factual basis must show that "the defendant's conduct was within the ambit of that defined as criminal"); *United States* v. *DeFusco*, 949 F.2d 114, 120 (4th Cir. 1991) (court must find factual basis "sufficient to constitute the alleged crime"), cert. denied, 503 U.S. 997 (1992).

1. As this Court has recognized, the legislature has substantial discretion to define the elements of criminal offenses. While "[t]he prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements," *Sullivan* v. *Louisiana*, 113 S. Ct. 2078, 2080 (1993) (citations omitted), "[t]he applicability of the reasonable-doubt standard * * * has always been dependent on how a State defines the offense that is charged in any given case," *Patterson* v. *New York*, 432 U.S. 197, 211 n.12 (1977). In *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), the Court applied that principle in the context of sentencing, upholding a Pennsylvania statute that made the visible possession of a firearm during the commission of a crime a sentencing factor to be determined by the trial judge by a preponderance of the evidence. See *id.* at 85 ("*Patterson* stressed that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive.").

2. The text and history of the relevant statutory provisions make clear that Congress conceived of forfeiture under the CCE statute as a punishment, not as an element of the crime. The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976, directs that "[a]ny person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment * * *, to a fine * * *, and to the forfeiture prescribed in section 853 of this title." 21 U.S.C. 848(a). The statute further provides that "[t]he court, in imposing sentence on [a person convicted under the CCE statute], shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection." 21 U.S.C. 853(a). The Act's legislative history likewise characterizes criminal forfeiture as punishment. See S. Rep. No. 225, 98th Cong., 1st Sess. 193 (1983) (criminal forfeiture "is imposed as a sanction against the defendant upon his conviction"); *id.* at 198 (same). Indeed, petitioner conceded the point in the court of appeals, "acknowledg[ing] that criminal forfeiture under § 853 is a part of the sentence, not a part of the substantive offense." J.A. 322.

3. The courts of appeals have uniformly recognized that "[t]he language of section 853(a) indicates that Congress intended criminal forfeiture of property to be a punishment." *United States* v. *Bieri*, 21 F.3d 819, 821 (8th Cir.), cert. denied, 115 S. Ct. 208 (1994). Thus, all of the courts of appeals that have considered the question have determined that, because forfeiture is a punishment, the forfeitability of particular assets under Section 853(a) must be proved by a preponderance of the evidence rather than by the "reasonable doubt" standard applicable to elements of the offense.[8] See *Bieri*, 21 F.3d

[8] Petitioner contends (Pet. Br. 20 n.12) that this case may be decided in his favor without resolving the question whether forfeitability must be established by proof beyond a reasonable doubt. But if (as petitioner also argues, see *id.* at 44) a criminal defendant is constitutionally entitled to a jury determination of forfeitability, it is difficult to see how a lower standard of proof could suffice. See *Sullivan*, 113 S. Ct. at 2081 ("It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. * * * In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt."); *United States* v. *Gaudin*, No. 94-514 (June 19, 1995), slip op. 3 (Fifth and Sixth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt").

at 821-822; *United States* v. *Ben-Hur*, 20 F.3d 313, 317 (7th Cir. 1994); *United States* v. *Elgersma*, 971 F.2d 690 (11th Cir. 1992) (en banc); *United States* v. *Hernandez-Escarsega*, 886 F.2d 1560, 1576-1577 (9th Cir. 1989), cert. denied, 497 U.S. 1003 (1990); *United States* v. *Smith*, 966 F.2d 1045, 1050-1052 (6th Cir. 1992); *United States* v. *Sandini*, 816 F.2d 869, 874-876 (3d Cir. 1987). See also *United States* v. *Saccoccia*, Nos. 93-1618, *et al.* (1st Cir. June 28, 1995), slip op. 59 (for purposes of the extradition laws, "criminal forfeiture is a punishment, not a separate criminal offense"); *United States* v. *Grammatikos*, 633 F.2d 1013, 1025 (2d Cir. 1980) ("[T]he forfeiture provision of 21 U.S.C. § 848 is not an essential element of the offense, but merely an additional penalty for its violation."). Cf. *United States* v. *Pelullo*, 14 F.3d 881, 901-906 (3d Cir. 1994) (concluding that Congress intended preponderance-of-the-evidence standard to apply to CCE forfeiture, but beyond-a-reasonable-doubt standard to RICO forfeiture).

In related contexts, this Court has likewise characterized criminal forfeiture as part of the sentence for the offense. See *Alexander* v. *United States*, 113 S. Ct. 2766, 2775-2776 (1993) ("The *in personam* criminal forfeiture [authorized by RICO] is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional 'fine.'"); *United States* v. *$8,850*, 461 U.S. 555, 567 (1983) (noting that a "criminal proceeding * * * may often include forfeiture as part of the sentence"). The Court's statement in *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 628 n.5 (1989), that "forfeiture is a substantive charge in the indictment against a defendant" is not to the contrary. See Pet. Br. 19-20. The Court made that observation in rejecting a Sixth Amendment objection to the forfeiture of attorney's fees, noting that the defendant's right to

counsel "for his defence," U.S. Const. Amend. VI, could not be converted to a substantive "defense" against a forfeiture allegation. As the Court elsewhere noted in *Caplin & Drysdale*, however, the drug forfeiture statute provides for the court to order forfeiture "in imposing sentence," 21 U.S.C. 853(a), and the defendant's charged offenses in that case "trigger[ed] this forfeiture provision." 491 U.S. at 620 n.1.

4. To treat the forfeitability of assets as an element of a substantive crime would be anomalous. There is no statutory offense for which an order of forfeiture (or a determination that certain assets are forfeitable) is a prerequisite to conviction. Petitioner, for example, could have been convicted of conducting a continuing criminal enterprise in violation of 21 U.S.C. 848 even if no allegation of forfeiture had been included in the indictment. Indeed, as petitioner notes (Pet. Br. 21 n.13), federal courts frequently conduct bifurcated trials in which the issue of forfeiture is submitted to the jury only after a finding of guilt—a procedural device at odds with the notion that forfeitability is an element of the criminal offense.

Petitioner correctly notes (Pet. Br. 21) that a defendant may plead guilty while contesting the government's forfeiture claims. Petitioner is incorrect, however, in his effort to analogize such a plea to one in which a defendant "plead[s] guilty to one count but not guilty on other counts." *Ibid.* Although petitioner claims to have understood his plea agreement "to contemplate further proceedings to determine which of [his] assets were tainted" (*id.* at 49), he does not and could not claim to have pleaded "not guilty" to any "charge" of forfeiture. Rather, a defendant who pleads guilty but offers no concessions as to the forfeitability of particular property is more accurately analogized

to a defendant who pleads guilty but contests the government's evidence or recommendation regarding the appropriate term of imprisonment.

C. Rules 7(c)(2), 31, and 32 Do Not Establish That The District Court Must Find A Factual Basis Under Rule 11(f) For A Forfeiture Agreement

Petitioner recognizes (Pet. Br. 20 n.12) that forfeiture cannot "be treated *for all purposes* as if it were an element" of an offense. Nevertheless, petitioner contends (*id.* at 15-21) that it is "like an element" (*id.* at 17 n.8) for purposes of Rule 11(f) because it must be alleged in the indictment and submitted to the jury under Rule 7 and Rule 31 of the Federal Rules of Criminal Procedure, and because it is distinguished from the judgment reflecting the "sentence" in Rule 32. Those provisions, however, do not bear on the proper construction of Rule 11(f). Rule 11(f) requires a factual basis for the elements of the crime of which the defendant will be convicted if the court accepts his plea; it does not apply to sentencing determinations to be made thereafter. Although petitioner refers to several provisions in the Federal Rules of Criminal Procedure that were specifically amended to deal with forfeiture issues, no such amendment was made to Rule 11.

1. After Congress enacted criminal forfeiture provisions in the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 943, for RICO violations, and in the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 408(a)(2), 84 Stat. 1265-1266, for CCE violations, the Federal Rules of Criminal Procedure were amended in three respects to take account of that development. A new Rule 7(c)(2) was added, which as presently worded states: "No judgment of forfeiture may be entered in a criminal

proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture." Rule 31(e) was amended to provide for a jury determination of the scope of forfeited property: "If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." Finally, Rule 32(d)(2) (in the present Rules) was amended to authorize, on a verdict of forfeiture, "the Attorney General to seize the interest or property subject to forfeiture on terms the court considers proper." Petitioner relies on that package of amendments to argue (Pet. Br. 19) that the "overall structure" of the Rules treats forfeiture as a part of the substantive offense. He places particular reliance (*id.* at 18) on the Advisory Committee's Note accompanying the 1972 amendment to Rule 31, which states: "The assumption of the draft is that the amount of the interest or property subject to criminal forfeiture is an element of the offense to be alleged and proved." 18 U.S.C. App. at 793.

The premises that underlay the 1972 amendments to Rules 7, 31, and 32 are of no relevance in construing the "factual basis" requirement. That requirement was placed in Rule 11 in 1966—well before the 1972 amendments. The 1972 amendments did nothing to alter the factual basis requirement, and that requirement, of course, does not expressly cover forfeiture. Just as "the views of one Congress as to the meaning of an act passed by an earlier Congress are not ordinarily of great weight," *United States* v. *X-Citement Video, Inc.*, 115 S. Ct. 464, 471 n.6 (1994); *United States* v. *Price*, 361 U.S. 304, 313 (1960), the 1972 Advisory Committee's Notes, even if they were deemed authoritative with respect to the 1972 amendments to Rules 7, 31, and 32, cast no light

on the proper construction of language added to Rule 11 in 1966.

Nor could it plausibly be argued that Rule 11 was implicitly changed to cover criminal forfeiture in 1972. The Federal Rules of Criminal Procedure may be changed only by Act of Congress or by this Court in accordance with the Rules Enabling Act, see 28 U.S.C. 2072, 2074 (1988 & Supp. V 1993). No amendment to Rule 11 could have been effected by the issuance of the 1972 Advisory Committee's Notes accompanying proposed Rules 7(c)(2), 31(e), and 32(d)(2). Cf. *NLRB* v. *Health Care & Retirement Corp. of America*, 114 S. Ct. 1778, 1784-1785 (1994); *American Hospital Ass'n* v. *NLRB*, 499 U.S. 606, 616 (1991). Moreover, the Advisory Committee's Notes to the amendments to Rule 11 that took effect in 1975 reaffirmed that the "factual basis" requirement is concerned with "the issue of guilt or innocence"; the Notes gave no suggestion that Rule 11(f) should be interpreted in light of the Committee's earlier assumption that forfeiture was to be regarded as an element of the criminal offense. See 18 U.S.C. App. at 743.[9]

[9] The question of what weight may be attached to the Advisory Committee's Notes here is different from the issue that divided the plurality and concurring Justices in *Tome* v. *United States*, 115 S. Ct. 696 (1995). The *Tome* plurality treated the Advisory Committee's Notes as substantial evidence of the drafters' intent, see *id.* at 702-708; Justice Scalia, while acknowledging the value of the Notes as "scholarly commentaries," concluded that "they bear no special authoritativeness as the work of the draftsmen," *id.* at 706 (Scalia, J., concurring in part and concurring in the judgment). Petitioner here, however, does not seek to use the Notes (as in *Tome*) to elucidate the meaning or proper application of the particular Rules to which they are appended. Rather, he asserts that the Notes should applied to interpret a different provision, Rule 11(f). The Advisory Committee's comments on one set of rules do not have special weight as to the meaning of another, previously promulgated rule.

Even if the 1972 Advisory Committee's Notes on other rules were deemed to reflect also an implicit comment about the operation of Rule 11, those Notes would not override the language of that Rule. Rule 11(f) does not by its terms require judicial inquiry into admissions or stipulations, included in a plea agreement, regarding the proper scope of criminal forfeiture. Rather, it directs the court to assure itself that there is a factual basis for the "plea"—a term consistently construed as limited to admissions relevant to the elements of the crime. If, as we have shown, criminal forfeiture is not an element of a crime (or an independent substantive offense), the Advisory Committee's mistaken belief to the contrary would not change the meaning of the word "plea." Cf. *Pierce* v. *Underwood*, 487 U.S. 552, 567 (1988) (committee report that reflects misunderstanding of existing law provides no basis for construing statutory language in other than the normal manner); *Shannon* v. *United States*, 114 S. Ct. 2419, 2426 (1994) (Court has not "given authoritative weight to a single passage of legislative history that is in no way anchored in the text of the statute" being interpreted).

In addition, petitioner's argument depends on the premise that this Court (in promulgating the 1972 amendments to Rules 7, 31, and 32 in the form proposed by the Advisory Committee) and Congress (in allowing those amendments to take effect without change) shared the Advisory Committee's "assumption" that the forfeitability of particular assets is an element of the substantive offense. Yet the Court and Congress may well have decided to require notice in the indictment of the extent of the interest alleged to be subject to forfeiture, to provide

for the jury rather than the judge to determine the extent of forfeitable property, and to provide for a separate forfeiture term in the judgment, even while recognizing that criminal forfeiture is a punishment rather than an element of the crime.

There can be no doubt, for example, that Congress regarded the new criminal forfeiture provisions it had enacted as criminal punishments. The Senate Report on the bill that resulted in the RICO forfeiture provisions stated: "Fine and imprisonment as criminal sanctions are not new. The use of criminal forfeiture, however, represents an innovative attempt to call on our common law heritage to meet an essentially modern problem." S. Rep. No. 617, 91st Cong., 1st Sess. 79 (1969). The Report also quoted extensively from the Department of Justice's comments on the bill, which made clear that the new criminal forfeiture provisions operated "*in personam* against the defendant who is the party to be punished upon conviction of violation of any provision of the section, not only by fine and/or imprisonment, but also by forfeiture of all interest in the enterprise." *Id.* at 80. Congress continued to treat criminal forfeiture as a punishment even after the amendments to the Federal Rules of Criminal Procedure on which petitioner relies. When Congress amended the CCE and RICO forfeiture provisions and created new forfeiture penalties for all felony drug cases in 1984, the Senate Report reiterated the view that federal criminal forfeiture "is an *in personam* proceeding against a defendant in a criminal case and is imposed as a sanction against the defendant upon his conviction." S. Rep. No. 225, 98th Cong., 1st Sess. 193 (1983). Congress regarded criminal forfeiture as such a punishment even though noting the forfeiture-related amendments in the Federal Rules of Criminal Procedure. See *id.* at 194 & n.15 (describing procedures and citing

Rules 31 and 32). The Advisory Committee's theory about the nature of criminal forfeiture therefore cannot be imputed to Congress.

D. Imposition Of A "Factual Basis" Requirement Is Neither Necessary Nor Appropriate To Prevent Potential Abuses Of Forfeiture Agreements

Petitioner offers a variety of policy arguments for applying Rule 11(f) to forfeiture stipulations. Such policy considerations provide no warrant for overriding the text of the Rule. In any event, petitioner's concerns are significantly overstated. A sentencing court may generally rely on sentencing stipulations by the parties, and may test their reliability in appropriate cases. Those procedures are applicable to forfeiture stipulations as well.

1. Petitioner contends (Pet. Br. 26-34) that Rule 11(f) should be read to apply to forfeiture stipulations because "the government may abuse forfeiture authority." In the same vein, petitioner's amicus suggests (NACDL Br. 7) that defendants "who are faced with draconian prison sentences under the federal sentencing guidelines * * * have no choice but to take whatever 'deal' is offered them by the government." This Court has previously recognized, however, that any potential for abuse of forfeiture authority should be addressed through case-by-case inquiry into actual overreaching, not through the formulation of broad prophylactic rules. See *Caplin & Drysdale*, 491 U.S. at 634-635.

There is no basis for a claim of overreaching in this case. The court and the parties had a solid basis for believing that petitioner's illicit profits substantially exceeded his known assets as of sentencing, making all of his property forfeitable under the statute. Even if non-forfeitable property had been identified, moreover, the court would have been required to impose a more sub-

stantial fine, including a costs-of-incarceration fine that is mandatory for defendants with the ability to pay. See Guidelines § 5E1.2(i). Presumably, petitioner entered into the forfeiture stipulation because the agreement as a whole gave him substantial benefits, and proceeding with the trial seemed likely to result in more unpleasant consequences. That petitioner's alternatives were unattractive did not make his situation coercive. See, *e.g.*, *United States* v. *Mezzanatto*, 115 S. Ct. 797, 805-806 (1995) ("The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government may encourage a guilty plea by offering substantial benefits in return for the plea.") (internal quotation marks omitted).

2. Petitioner also observes (Pet. Br. 30) that, "[i]n developing the forfeiture provisions for RICO and CCE in 1970, Congress drew a sharp distinction between forfeiture of a defendant's entire estate—which continues to be unlawful—and forfeiture of specific assets shown to have been tainted by criminal conduct." He asserts (*id.* at 31) that, "[i]n the absence of a factual basis requirement for forfeiture pursuant to a guilty plea, the prosecution may use the plea process to exceed the limitations imposed by Congress in section 853, even to the extent of forfeiture of estate." There is no basis for that contention, and in any event it would not justify distorting the text of Rule 11(f) to address the issue.

a. Determination of an appropriate criminal sentence typically involves consideration of a broad array of pertinent information. While the parties may insist upon judicial resolution of factual disputes, they may also reach agreement about the relevant facts and reduce their agreements to formal stipulations for submission to the court. In the plea agreement in this case, for

example, petitioner "agree[d] to transfer his right, title, and interest in all of his assets to the Division of Criminal Investigation of the Wyoming Attorney General." J.A. 81. That agreement is best understood as petitioner's stipulation that all of the property he owned met the requirements for forfeiture under 21 U.S.C. 853.

Stipulations regarding the forfeitability of assets are subject to the legal principles governing sentencing stipulations generally. Stipulations may often establish facts bearing directly on the length of a defendant's confinement, yet such stipulations are not subject to the requirements of Rule 11(f), which "does not by its terms apply to circumstances other than formal pleas of guilty." *United States* v. *Lyons*, 898 F.2d 210, 214 (1st Cir.), cert. denied, 498 U.S. 920 (1990). Rather, "[s]tipulations freely and voluntarily entered into in criminal trials are as binding and enforceable as those entered into in civil actions." *United States* v. *Shapiro*, 879 F.2d 468, 470 (9th Cir. 1989) (internal quotation marks omitted). See, *e.g.*, *Mezzanatto*, 115 S. Ct. at 801-806 (enforcing waiver of rights conferred by Rule 11(e)(6) and Fed. R. Evid. 410 without Rule 11 procedures); *Adams* v. *Peterson*, 968 F.2d 835, 839-841 (9th Cir. 1992) (en banc) (same for defendant's stipulation to individual elements of a criminal offense; collecting cases), cert. denied, 113 S. Ct. 1818 (1993); *Lyons*, 898 F.2d at 214-215 (same; collecting cases). See also *Town of Newton* v. *Rumery*, 480 U.S. 386, 394 (1987).

The Sentencing Guidelines expressly provide that "[a] plea agreement may be accompanied by a written stipulation of facts relevant to sentencing." Guidelines § 6B1.4(a).[10] The Guidelines also treat forfeiture as an

---

[10] Cf. 18 U.S.C. 3663(a)(3) (Supp. V 1993) (sentencing court "may also order restitution in any criminal case to the extent agreed to by the

aspect of sentencing. See Guidelines § 5E1.4 ("Forfeiture is to be imposed upon a convicted defendant as provided by statute."); see *United States* v. *Investment Enterprises, Inc.*, 10 F.3d 263, 271 (5th Cir. 1993). The Guidelines make clear that "it is not appropriate for the parties to stipulate to misleading or non-existent facts, even when both parties are willing to assume the existence of such 'facts' for purposes of the litigation." Guidelines § 6B1.4 (Commentary). It is entirely appropriate, however, for government counsel to stipulate to facts that counsel believes to be true but that may be difficult, time consuming, or expensive to prove. Such a stipulation should not be rejected by the court simply because it lacks affirmative record support: The point of a stipulation is to obviate the need for evidentiary proof. Cf., *e.g.*, *Sinicropi* v. *Milone*, 915 F.2d 66, 68 (2d Cir. 1990) ("Courts generally enforce stipulations that narrow the issues in a case."); *FDIC* v. *St. Paul Fire & Marine Ins. Co.*, 942 F.2d 1032, 1038 (6th Cir. 1991) ("Stipulations serve the purpose of conserving judicial resources and allowing the parties to focus on truly disputed issues.").

"The court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing." Sentencing Guidelines § 6B1.4(d). Nevertheless, the usual premise of an adversary system is that stipulations to which the parties agree are presumptively valid. And while a

parties in a plea agreement"); *United States* v. *Lavin*, 27 F.3d 40, 42 (2d Cir.) (district court properly ordered restitution of $126,320 although indictment alleged loss of "approximately $119,000"; "[defense] counsel unequivocally stated at sentencing that [defendant] did not contest the $126,320 figure," and "[t]he parties therefore agreed to a different amount than was specified in count two of the indictment"), cert. denied, 115 S. Ct. 453 (1994).

criminal defendant may seek to invalidate a stipulation on the ground that it was procured through fraud or coercion, see *Mezzanatto*, 115 S. Ct. at 806, he should not be permitted to urge the district court to go behind (and reject) the statement of facts that he has admitted to be true.[11]

In this case, the district court reasonably accepted the parties' stipulation that all of petitioner's property was subject to forfeiture. The stipulation was plausible in light of petitioner's admitted criminal conduct, and it was not called into question by the PSR or by evidence presented at trial before petitioner's change of plea. As the court noted in rejecting petitioner's post-sentencing objection to the lack of a factual basis for the forfeiture, "the evidence that I heard before me in the * * * trial I think is sufficient to warrant the granting of forfeiture." J.A. 154. Indeed, at a post-sentencing hearing on third-party claims, one government witness testified that "our best estimate of [petitioner's] drug trafficking is that he had profited in excess of a million dollars, and that was a conservative estimate." J.A. 237. The total value of the forfeited property, however, was only $410,000. J.A. 329. Under the statute's substitute assets provision, 21 U.S.C. 853(p), all of petitioner's property would therefore have been forfeitable even if *none* of petitioner's assets at the

[11] The stipulation in this case might be roughly analogized to the portion of the agreement (see J.A. 80) by which the government promised to recommend the minimum 20-year sentence. Petitioner assumed the risk that the court would decide on its own to impose a longer term, see *United States* v. *Benchimol*, 471 U.S. 453 (1985), but he did not assume the risk that the government would urge the court to do so, see *Santobello*, 404 U.S. at 262. By the same token, the government took the chance that the court would decide on its own to impose a lower forfeiture, but petitioner had no legal right to urge that result and no cause to complain that it was not done.

time of sentencing had facilitated criminal activity or been acquired with illicit proceeds.

b. Even if it were appropriate to subject stipulations regarding forfeiture to more searching judicial scrutiny than is given to sentencing stipulations generally, that scrutiny should not be conducted under the rubric of Rule 11(f). "The normal consequence of a determination that there is not a factual basis for [a] plea [of guilty] would be for the court to set aside the plea and enter a plea of not guilty." Fed. R. Crim. P. 11 advisory committee's note, 18 U.S.C. App. at 739 (1966 Amendment). Because the court's rejection of a forfeiture stipulation would not call into question the defendant's acknowledgement of guilt of the substantive offense, it could provide no basis for setting aside the plea. Rather, the appropriate course would be to accept the plea of guilty, and then to sentence the defendant based on a determination of what assets are forfeitable.[12]

3. Petitioner and his amici contend (Pet. Br. 34-39; NACDL Br. 9-13; FEAR Br. 26-27) that a factual basis inquiry into forfeiture stipulations is necessary to ensure that third parties are not unfairly deprived of property transferred to them by the defendant. Third-party interests, however, are adequately protected through the procedures established by 21 U.S.C. 853(n). Indeed,

[12] Under Federal Rule of Criminal Procedure 11(e)(1)(C), a guilty plea may be made contingent on the court's acceptance of a particular sentencing recommendation; if the court rejects the parties' agreement as to the appropriate sentence, the defendant must be allowed to withdraw the plea. See *United States* v. *Fernandez*, 960 F.2d 771, 771-773 (9th Cir. 1992) (per curiam); Fed. R. Crim. P. 11(e)(4); Guidelines § 6B1.3. If a sentencing stipulation or recommendation contained in a plea agreement were part of the defendant's "plea of guilty" within the meaning of Rule 11(f), *all* plea agreements containing such terms would effectively become Rule 11(e)(1)(C) agreements.

Caplin & Drysdale involved a stipulated forfeiture, see 491 U.S. at 621, and the Court did not suggest that this procedure posed special concerns. This case, as well, illustrates the exercise of jurisdiction by the district court to return to third-party claimants property of which they established ownership. See J.A. 298-312. The court of appeals specifically acknowledged the existence of such jurisdiction. J.A. 318-319. Accordingly, third-party claims may be protected through the procedures directly provided for that purpose, rather than through the indirect means of requiring Rule 11(f) inquiries of the defendant before acceptance of a forfeiture agreement.

E. A "Factual Basis" Determination For Forfeiture Stipulations Is Not Related To Protecting The Knowing And Voluntary Nature Of A Guilty Plea

Finally, petitioner contends (Pet. Br. 21-22) that an inquiry into the factual basis for a forfeiture stipulation furthers the underlying purpose of Rule 11 to ensure that a plea is knowing and voluntary. He maintains (*id.* at 22-25) that this case illustrates the potential for a defendant to misunderstand a forfeiture agreement absent a searching inquiry by the court. In fact, this case illustrates the wisdom of a rule that would preclude a defendant from repudiating a stipulation to which he knowingly agreed with the advice of counsel, particularly when no objection is raised until after the imposition of sentence.

Petitioner argues in this Court that the plea agreement was ambiguous and that he did not intend to concede that all of his property was forfeitable. He also claims (Pet. Br. 25) that he would not have pleaded guilty if he had construed the agreement to include an admission that all of his assets were subject to forfeiture. In the district

court, however, neither petitioner nor his attorney contended that the agreement "contemplate[d] further proceedings to determine which of petitioner's assets were tainted." *Id.* at 49. To the contrary, petitioner's counsel characterized the forfeiture sought by the government as "a bitter pill dealt by Congress, but * * * a pill we must swallow." J.A. 149. Although petitioner objected in the district court to the purported lack of a factual basis for the forfeiture (J.A. 154), he did not contend that he had not *agreed* to the forfeiture.

Based on a detailed examination of the record, the court of appeals concluded that petitioner "intended to forfeit all of his property without requiring the government to prove the assets were forfeitable," J.A. 324; that he did so "unambiguously," J.A. 325; and that he gave a "knowing and voluntary ratification of that agreement at the change of plea hearing," J.A. 326. There is no reason for this Court to reexamine those holdings.

Petitioner argues (Pet. Br. 25) that a factual basis inquiry pursuant to Rule 11(f) would have revealed any misunderstanding concerning the terms of the parties' bargain. The factual basis inquiry mandated by Rule 11(f), however, would generally be an inapt method of revealing hidden misunderstandings between the parties. To the extent that the parties' stipulation appears ambiguous, the court's inquiry should focus on the meaning of the agreement, rather than on the underlying facts; the purpose of a stipulation, after all, is to relieve the litigants of the need to persuade the court that the stipulated facts are true.

Petitioner's belated effort to extricate himself from the stipulations he made should be rejected. As the court of appeals noted, petitioner obtained substantial benefits from the plea agreement, including the government's

willingness to forgo prosecution on all counts but the CCE and the recommendation of the minimum term of imprisonment. J.A. 325. The district court properly accepted the guilty plea after determining, through extensive colloquy, see J.A. 84-121, that there was a factual basis for petitioner's admission of guilt. No more was required to comply with Rule 11(f). There is, accordingly, no basis for permitting petitioner to deprive the government of the benefits it sought to obtain under the agreement, while petitioner retains the benefits the agreement afforded him.

II. PETITIONER'S FORFEITURE STIPULATION WAIVED THE RIGHT TO A JURY DETERMINATION ON FORFEITURE ISSUES

Federal Rule of Criminal Procedure 31(e) provides that, "[i]f the indictment or information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any." As construed by the courts below, the plea agreement in this case reflected the agreement of the parties that the court (rather than a jury) would make the determination regarding the forfeitability of petitioner's assets.[13]

---

[13] At the change of plea hearing, the district court stated (J.A. 87) that, if petitioner elected to plead guilty, the jury would be dismissed. Neither petitioner nor his attorney objected to the jury's dismissal. Nor did petitioner or his attorney assert, in response to the government's subsequent motion for forfeiture, that the issue should be resolved by a jury rather than the court. The court of appeals noted that "there is no evidence at [the change of plea] hearing that [petitioner] wanted a jury trial on the forfeiture issue, or thought he was going to have one," J.A. 328; and the court of appeals, like the district court, construed the plea agreement as waiving petitioner's rights under Rule 31(e), J.A. 327-328. In this Court, petitioner states only that "the agreement seems to contemplate further proceedings to

Petitioner acknowledges, as he must, that the provisions of Rule 31(e) are subject to waiver—*i.e.*, a defendant may agree that the scope of criminal forfeiture will be determined by the court. See *United States* v. *Mezzanatto*, *supra*. He contends, however, that such an agreement may be enforced only if the defendant himself is shown to have been cognizant of his right to a jury finding on the scope of forfeiture. That argument is without merit.

This Court's decisions establish a narrow category of particularly fundamental constitutional rights that may not be waived without meeting the stringent standards of "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). There is, however, no constitutional right to a jury determination of forfeiture. While there is a right under Rule 31(e) to such a jury determination, neither the Federal Rules of Criminal Procedure nor this Court's decisions require that a defendant be specifically apprised of that right before it may be waived. In this case, petitioner voluntarily and intentionally agreed to remove any dispute about the scope of his forfeitable assets by entering into a stipulation that all of his assets were forfeitable. The effect of that stipulation was to waive any right to litigate those issues further, before a jury or otherwise. Under applicable waiver principles, his surrender of his rights under Rule 31(e) was entirely valid.[14]

---

determine which of petitioner's assets were tainted, though there was no indication of the mechanism for that determination." Pet. Br. 49.

[14] It is not clear whether petitioner contends that his guilty plea was invalid because he was not informed about his Rule 31(e) rights, or, rather, whether he accepts his guilty plea and challenges only the validity of his waiver of a jury trial on forfeiture issues. Neither approach, however, would have merit.

A. The Sixth Amendment Does Not Protect The Right To A Jury Trial On Forfeiture

Petitioner contends (Pet. Br. 41-45) that the right to submit the issue of criminal forfeiture to the jury is protected by the Sixth Amendment, which states that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." That contention is incorrect. "The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States* v. *Gaudin*, No. 94-514 (June 19, 1995), slip op. 5. A determination that particular assets are subject to forfeiture, however, goes not to the establishment of the elements of the crime or to the "ultimate conclusion of guilt or innocence," *id.* at 9, but to the appropriate sentence for the offense. See pages 19-24, *supra*. While "[a] defendant charged with a serious crime has the right to have a jury determine his guilt or innocence," *Cabana* v. *Bullock*, 474 U.S. 376, 384 (1986) (citing *Duncan* v. *Louisiana*, 391 U.S. 145 (1968)), "[t]he decision whether a particular punishment * * * is appropriate in any given case is not one that [the Court] ha[s] ever required to be made by a jury," *Cabana*, 474 U.S. at 385. Accord *McMillan* v. *Pennsylvania*, 477 U.S. 79, 93 (1986) ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.").

Petitioner's reliance (Pet. Br. 41) on "the common law tradition of submitting forfeiture to the petit jury" as a basis for incorporating forfeiture into the Sixth Amendment is misplaced. As the authorities discussed by petitioner (see *id.* at 29 n.21, 42-44) make clear, findings regarding the nexus between particular assets and a defendant's criminal activities were irrelevant to common law *in personam* criminal forfeiture. Rather,

the necessary consequence of conviction for specified crimes was the forfeiture of *all* of the defendant's property.[15] The jury's limited role was to determine what assets the defendant owned. That modest function does not suggest that the Framers would have perceived the jury in a forfeiture case as a central right of the defendant in a criminal trial. See Note, *A Proposal To Reform Criminal Forfeiture Under RICO and CCE*, 97 Harv. L. Rev. 1929, 1937-1938 (1984) ("Although it is true that at common law the jury customarily reported the size of the defendant's holdings after announcing the verdict in a felony case, this jury report was simply one of a number of bookkeeping devices used to facilitate collection of the forfeiture penalty. Under the common law rule, all the offender's property was forfeited; the jury had no legal power to protect the defendant against an excessive forfeiture.").

---

[15] In *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974), the Court explained that "[f]orfeitures also resulted at common law from conviction for felonies and treason. The convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all of his property, real and personal, to the Crown. See 3 W. Holdsworth, History of English Law 68-71 (3d ed. 1927); 1 F. Pollock & F. Maitland, History of English Law 351 (2d ed. 1909). The basis for these forfeitures was that a breach of the criminal law was an offense to the King's peace, which was felt to justify denial of the right to own property. See 1 W. Blackstone, Commentaries *299." See also *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) ("It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown."); *United States* v. *Sandini*, 816 F.2d at 873 (referring to "the traditional forfeiture of all of a felon's property even if it had no connection with the crime"); *United States* v. *Grande*, 620 F.2d 1026, 1038 (4th Cir.) ("Under early English law, the complete forfeiture of all real and personal property followed as a consequence of conviction of a felony or treason."), cert. denied, 449 U.S. 830, 919 (1980).

There is consequently no basis for the assertion that determinations of the sort required by Section 853 were traditionally made by English (or early American) juries in criminal prosecutions. Nor is there any foundation for the view that forfeiture issues are so fundamental that they alone, among all sentencing issues, must be decided by a jury as a matter of constitutional right. Just as there is no right to jury sentencing in a capital case, there is no right to jury sentencing on forfeiture issues. See *Clemons* v. *Mississippi*, 494 U.S. 738, 745 (1990) ("Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by * * * this Court."); *Hildwin* v. *Florida*, 490 U.S. 638, 640-641 (1989) (per curiam) ("[T]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."); *Walton* v. *Arizona*, 497 U.S. 639, 647-648 (1990) (sustaining capital sentencing scheme that did not require jury involvement in sentencing).

B. The Right Under Rule 31(e) To A Jury Trial On Forfeiture Issues Was Waived By Petitioner's Agreement To Forfeit His Assets

Petitioner contends that, even if the right to a jury determination on forfeiture is not of constitutional dimension, a defendant must be specifically advised of that right because "Rule 31(e) expresses a fundamental judgment about the safeguards that are necessary when the government seeks to impose forfeiture as well as imprisonment on an accused." Pet. Br. 47. That contention is supported neither by the structure of the Federal Rules of Criminal Procedure, nor by general principles regarding the waiver of rights.

1. The Federal Rules of Criminal Procedure contain detailed provisions governing the waiver of rights in conjunction with a plea of guilty. Rule 11(c) identifies the information that the court must communicate to a criminal defendant in order to ensure the validity of a guilty plea. Rule 11(c)(3) does not require that a criminal defendant be advised of his right, pursuant to Rule 31(e), to a special jury verdict regarding "the extent of the interest or property subject to forfeiture." The district court *is* required to inform the defendant of a small set of fundamental rights of procedure in a criminal trial that Congress specified in 1975, see Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, § 3(5), 89 Stat. 371, on the theory that "the warnings given to the defendant ought to include those that *Boykin* v. *Alabama*, 395 U.S. 238 (1969), said were constitutionally required." H.R. Rep. No. 247, 94th Cong., 1st Sess. 7 (1973) (*1975 House Report*).[16] Because the right to a jury determination of forfeiture provided

[16] The proposed Rule 11(c) transmitted by this Court to Congress in 1974 would have required a substantially less extensive colloquy than the Rule as enacted. See 94 S. Ct. 3275, 3279 (1974). Although the 1975 House Report describes the additional warnings mandated by current Rule 11(c)(3) as "constitutionally required" under *Boykin*, see *1975 House Report* 7, *Boykin* does not actually so hold. Rather, *Boykin* states that the rights subsequently enumerated in Rule 11(c)(3) can be validly waived only by a defendant with actual knowledge of their existence, and that a reviewing court "cannot presume a waiver of these three important federal rights from a silent record." 395 U.S. at 243. The *Boykin* Court did not require, as a matter of constitutional law, that a defendant receive the pertinent information from the trial court itself. See also *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969) (procedures required by Rule 11 "ha[ve] not been held to be constitutionally mandated").

by Rule 31(e) stands on a nonconstitutional footing, it is not covered in the required colloquy.[17]

That understanding of Rule 11(c)(3) is buttressed by Rule 11(c)(1), which describes the sentencing information that must be communicated by the court to the defendant before a guilty plea can be accepted. The court is required to inform the defendant of "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and when applicable, that the court may also order the defendant to make restitution to any victim of the offense." Fed. R. Crim. P. 11(c)(1). The Rule thus requires that the defendant be made aware of a variety of factors bearing upon the sentence he is likely to receive upon pleading guilty. The Rule does not, however, require the provision of complete and detailed information concerning the sentence to which

[17] Even if petitioner were correct in arguing that the determination of what property is forfeitable is "a part of the criminal prosecution for purposes of the Sixth Amendment" (Pet. Br. 45), the district court's failure to inform him specifically of that aspect of his jury trial right would not render his plea invalid or undermine the validity of his forfeiture stipulation. At the change of plea hearing, the court advised petitioner that "you have a right to a speedy and public jury trial, which we're in the middle of." J.A. 86; see also J.A. 80 (plea agreement acknowledged waiver of "the right to a jury trial"). The colloquy was sufficient to satisfy Rule 11(c)(3), which simply requires the court to inform the defendant that he has "the right to be tried by a jury." Similarly, the *Johnson* v. *Zerbst* standard for waiver of the right to jury trial requires that the defendant be generally cognizant of the existence of that right, but it does not require him to understand the precise scope of the issues within the jury's authority.

the defendant would be subject if he proceeded to trial and were ultimately convicted. Cf. *Brady* v. *United States*, 397 U.S. 742, 756-757 (1970) (defendant's guilty plea was intelligently made despite his reasonable but mistaken belief, at the time the plea was entered, that if tried and convicted he would be subject to a possible sentence of death). It would therefore be anomalous to require the district court to advise the defendant regarding the procedural mechanism by which sentence would be imposed if the defendant declined to plead guilty but was convicted at trial.[18]

2. Petitioner argues (Pet. Br. 47-48) that only a "knowing and intelligent waiver" under the standard

[18] Petitioner's suggestion (Pet. Br. 47-48) that Rule 23(a) indicates that the Rules contemplate a specific waiver of the right to a jury trial on forfeiture is misplaced. Rule 23(a) provides that "[c]ases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." As the Advisory Committee's Notes make clear, "[t]h[e] rule is a formulation of the constitutional guaranty of trial by jury," and the written waiver requirement was designed to conform to the existing practice at the time of adoption of the rule in 1944. 18 U.S.C. App. at 783. Nothing in the text or Advisory Committee's comments suggests that this provision (or any similar requirement) applies to the waiver of the right under Rule 31(e) to a jury verdict on forfeiture issues. Moreover, Rule 23 applies to "*Trial* by Jury or by the Court" (emphasis added), see also Rule 23(c) (outlining procedures applicable to "Trial Without a Jury"), and applies only when the defendant desires a trial before the court without a jury. See *Singer* v. *United States*, 380 U.S. 24 (1965). Its procedures are distinct from the Rules governing "Pleas" (Rule 11) and "Sentence and Judgment" (Rule 32). Finally, petitioner in his written plea agreement expressly waived "the right to a jury trial" and consented to the forfeiture of all his assets. J.A. 80, 81. Even if the right to a jury determination of forfeiture were part of the right to trial by jury protected by the Sixth Amendment, petitioner's written waiver was sufficient to comply with both the Constitution and Rule 23. See note 17, *supra*.

of *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938), can extinguish a criminal defendant's right under Rule 31(e) to a jury determination on forfeiture issues. There is no basis for applying that stringent standard in this context. A defendant who voluntarily and intentionally enters into an agreement to specify the scope of his forfeitable assets is bound by his agreement, even though the court may not have personally informed him about a variety of legal rights that may bear on the wisdom or desirability of his chosen course of action. The defendant may not later invalidate his agreement on the theory that he was unaware of procedural rights, such as Rule 31(e), that would have been available if he had contested the government's allegations.

The principle that a defendant may waive rights of which he has not been specifically advised by the court is consistent with the law of waiver generally. " 'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.' " *United States* v. *Olano*, 113 S. Ct. 1770, 1776 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). A requirement that the defendant must have specific knowledge of a right to waive it is a rare exception. A plea of guilty, for example, constitutes a waiver of the constitutional rights to a jury trial, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. See *Parke* v. *Raley*, 113 S. Ct. 517, 523 (1992); *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). For the plea to be valid, the defendant must be aware of those rights and intentionally relinquish them. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969). But a valid guilty plea also relinquishes a variety of other constitutional and

statutory rights. Neither this Court's cases nor Rule 11 requires the defendant to be aware of all of those rights before his plea of guilty may extinguish them.

For example, a guilty plea extinguishes constitutional defenses of which the defendant may have no knowledge. In *United States* v. *Broce*, 488 U.S. 563, 573 (1989), this Court noted that "[o]ur decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty." The Court then held that the plea in that case had relinquished a potential defense under the Double Jeopardy Clause of which the defendant had no knowledge. *Id.* at 572-574. See also *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973) ("A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge."). Similarly, a defendant has the right to challenge preindictment delay under the Due Process Clause, to insist on a speedy trial under the Sixth Amendment, to invoke the exclusionary rule under the Fourth Amendment, and to require the production of exculpatory evidence under the Due Process Clause. A guilty plea waives all of those rights. See *Smith* v. *United States*, 876 F.2d 655, 657 (8th Cir.) (per curiam) (defendant's guilty plea "waived his claims on search and seizure * * * and failure to disclose favorable evidence"), cert. denied, 493 U.S. 869 (1989); *Tiemens* v. *United States*, 724 F.2d 928, 929 (11th Cir.) (per curiam) (guilty plea waived right to speedy trial and claim of preindictment delay), cert. denied, 469 U.S. 837 (1984). Yet this Court has never suggested that waivers of those rights are invalid if the defendant was not told that he possessed them at the time of his plea.

The same is true with respect to statutory rights. The acceptance of the plea of guilty waives the right to

enforce the discovery provisions of Federal Rule of Criminal Procedure 16, the right to the production of statements under the Jencks Act (18 U.S.C. 3500), and the right to have guilt or innocence determined at a trial governed by the Federal Rules of Evidence. None of those waivers is vulnerable on the basis that the defendant may not have known about the existence of the underlying right. See also *Peretz* v. *United States*, 501 U.S. 923 (1991) (defendant may validly consent to selection of a jury by a magistrate, thus waiving statutory and possible Art. III rights; no suggestion that defendant must be aware of those rights); *United States* v. *Gagnon*, 470 U.S. 522, 528 (1985) (per curiam) (defendant's voluntary absence waived the right to be present under the Constitution and Fed. R. Crim. P. 43, even though there was no express waiver); *Acevedo-Ramos* v. *United States*, 961 F.2d 305, 308-309 (1st Cir.) ("[L]ike other affirmative defenses, the statute of limitations is deemed waived when a defendant pleads guilty even if the defendant did not make a knowing and express waiver of the defense."), cert. denied, 113 S. Ct. 299 (1992); *Lebowitz* v. *United States*, 877 F.2d 207, 209-210 (2d Cir. 1989) (guilty plea waived right to assert an alleged Speedy Trial Act violation); *Baxter* v. *United States*, 966 F.2d 387, 389 (8th Cir. 1992) (per curiam) (guilty plea waived right to assert an alleged violation of the Interstate Agreement on Detainers). A defendant's voluntary conduct can thus waive a variety of rights of which he may be unaware. There is no principled basis on which Rule 31(e) rights can be deemed more "fundamental" or more difficult to waive than those rights. See *United States* v. *Zang*, 703 F.2d 1186, 1194-1195 (10th Cir. 1982) ("The parties can waive their right

to a special verdict [under Rule 31(e)] by not making a timely request."), cert. denied, 464 U.S. 828 (1983).[19]

Beyond the very small set of rights that this Court has identified as requiring a personal waiver, the explanation of a defendant's rights is generally the province of counsel for the defendant. In an adversary system, defense counsel bears primary responsibility for advising his client concerning the advantages and disadvantages of a guilty plea and associated concessions. So long as the district court conducts the colloquy mandated by Rule 11(c), "[a] failure by counsel to provide [additional] advice may form the basis of a claim of ineffective assistance of counsel, but absent such a claim it cannot serve as the predicate for setting aside a valid plea." *Broce*, 488 U.S. at 574; *Hill* v. *Lockhart*, 474 U.S. 52 (1985).[20]

---

[19] In *United States* v. *Robinson*, 8 F.3d 418 (7th Cir. 1993), the court of appeals concluded that the Rule 31(e) right to a jury trial on forfeiture was "important" enough to require a knowing and voluntary waiver. *Id.* at 421 (relying on authority requiring a defendant's knowing and voluntary waiver of the right to appeal). *Robinson*, however, did not explain its conclusion on the "importance" of the right, or why other statutory rights could be waived without meeting the "standard for evaluating waivers of constitutional rights." *Id.* at 421-422.

[20] Indeed, many rights can be waived by the act or omission of trial counsel alone, without the participation of the defendant in the decision. See *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965) (counsel's failure to object contemporaneously to the admission of evidence as a part of trial strategy binds the defendant); *Faretta* v. *California*, 422 U.S. 806, 820-821 (1975) ("law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas"); *Taylor* v. *Illinois*, 484 U.S. 400, 418 (1988) ("[T]he lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval."); *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986) ("So long as a defendant is represented by counsel whose performance is

That principle is fully applicable here. Petitioner elected to reach agreement with the government regarding a disposition of this case, and to remove from the realm of dispute whether his assets were subject to forfeiture. He did so in the context of a plea agreement entered into with the advice of counsel, which was designed to end litigation before the jury on the question of his guilt and to proceed to sentencing in accordance with the agreed-upon terms. The necessary effect of that agreement was to forgo his Rule 31(e) right to a jury trial on the issue of forfeiture. It was not the court's responsibility to apprise petitioner of Rule 31(e) before accepting his stipulation regarding forfeiture. Rather, even if knowledge of that right might conceivably have induced petitioner to reject the plea agreement and proceed with trial, that issue, like many other issues that may have affected petitioner's decision, fell to counsel to explore with petitioner.

Petitioner's contrary approach would subvert the ability of plea agreements to secure "prompt and largely final disposition of most criminal cases." *Santobello* v. *New York*, 404 U.S. 257, 261 (1971). In most settings, courts can currently protect the defendant's rights by engaging in the colloquy required by Rule 11(c). Petitioner's expansive application of the *Johnson* v. *Zerbst* standard, however, would replace the relative certainty of Rule 11(c) with a free-form inquiry into whether any of the myriad statutory (or constitutional) rights surrendered in the course of a guilty plea or subsequent sentencing were comparably "fundamental."

---

not constitutionally ineffective under the standard established in *Strickland* v. *Washington*, [466 U.S. 668 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default.").

As one court has noted, "Rule 11's value is as a formulary." *United States* v. *Wenger*, No. 93-4043 (7th Cir. June 15, 1995), slip op. 3. Ad hoc additions to the colloquy that a court must conduct with a defendant before accepting a plea of guilty would inject considerable uncertainty into the disposition of plea agreements.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General
JO ANN HARRIS
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DAVID S. KRIS
Attorney

AUGUST 1995

APPENDIX

Federal Rule of Criminal Procedure 7(c)(2) provides:

> **Criminal Forfeiture.** No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

Federal Rule of Criminal Procedure 11(c) provides:

> **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and
>
> (2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and
>
> (3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine

adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

Federal Rule of Criminal Procedure 11(f) provides:

Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

Federal Rule of Criminal Procedure 23 provides:

Trial by Jury or by the Court

(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) Jury of Less Than Twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences. Even absent such stipulation, if the court finds it

necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors.

(c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

Federal Rule of Criminal Procedure 31(e) provides:

Criminal Forfeiture. If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any.

Federal Rule of Criminal Procedure 32(d)(2) provides:

Criminal Forfeiture. When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.

21 U.S.C. 848(a) provides:

Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in

section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

21 U.S.C. 853(a) provides:

Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording

a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

21 U.S.C. 853(p) provides:

Forfeiture of substitute property

If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

Supreme Court, U.S.
FILED
SEP 5 1995
CLERK

(8)

No. 94-7427

In The

Supreme Court of the United States

October Term, 1995

JOSEPH V. LIBRETTI, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

Of Counsel:
PAUL K. SUN, JR.
SMITH HELMS MULLISS & MOORE, L.L.P.
316 West Edenton Street
Post Office Box 27525
Raleigh, North Carolina 27611
Telephone: 919-755-8720

SARA SUN BEALE
(Appointed by this Court)
Counsel of Record
Duke University School of Law
Science Drive & Towerview Road
Post Office Box 90360
Durham, North Carolina 27708-0360
Telephone: 919-613-7091
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25 pp

TABLE OF CONTENTS

Page

I. RULE 11(f) REQUIRES THE DISTRICT COURT TO SATISFY ITSELF THAT THERE IS A FACTUAL BASIS FOR THE FORFEITURE PART OF A GUILTY PLEA 1

II. THE RIGHT TO A JURY DETERMINATION OF CRIMINAL FORFEITURE CAN BE EXTINGUISHED ONLY BY A KNOWING AND INTELLIGENT WAIVER 13

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Bushell's Case, 124 Eng. Rep. 1006 (1670) 13

Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989) 7

Duncan v. Louisiana, 391 U.S. 145 (1968) 14

Greene v. Briggs, 10 F. Cas. 1135 (C.C.D.R.I. 1852) (No. 5,674) 15

Jackson v. The Steamboat Magnolia, 61 U.S. (20 How.) 296 (1857) 16

McCarthy v. United States, 394 U.S. 459 (1969) 6

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 4, 17

Sullivan v. Louisiana, 113 S. Ct. 2078 (1993) 15

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 18

United States v. The Betsey and Charlotte, 8 U.S. (4 Cranch) 443 (1808) 16

United States v. Gaudin, 115 S. Ct. 2310 (1995) 15

United States v. Guardino, 972 F.2d 682 (6th Cir. 1992) 12

United States v. Pelullo, 14 F.3d 881 (3d Cir. 1994) 15

United States v. Rice, 954 F.2d 40 (2d Cir. 1992) 12

United States v. Robinson, 8 F.3d 418 (7th Cir. 1993) 18

United States v. Snider, 957 F.2d 703 (9th Cir. 1992) 12

Wood v. Georgia, 370 U.S. 375 (1962) 14

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

18 U.S.C. § 3593(b) 4

18 U.S.C. App., Notes of Advisory Committee on Rules – 1966 Amendment 9

21 U.S.C. § 853 ..... 2, 11, 15

21 U.S.C. § 853(a) 11

21 U.S.C. § 853(n) 10

21 U.S.C. § 853(p) 11, 12

28 U.S.C. § 994(a)(1) 4

Fed. R. Crim. P. 7(c)(2) 3, 4, 6

Fed. R. Crim. P. 11 .....5, 9, 18, 19

Fed. R. Crim. P. 11(c) 19, 20

Fed. R. Crim. P. 11(c)(3) 19

Fed. R. Crim. P. 11(c)(4) 19

Fed. R. Crim. P. 11(f) 1, 4, 6, 9, 10, 12

Fed. R. Crim. P. 31(e) 4, 6, 18, 19

Fed. R. Crim. P. 32 6

Fed. R. Crim. P. 32(b)(4) 3

Fed. R. Crim. P. 32(d) 4

U.S.S.G., Ch. 1, Pt. A, intro. comment 4

U.S.S.G. § 5E1.4 3

U.S.S.G. § 6B1.4(a) 2

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

American Law Institute, *Model Penal Code and Commentaries* (1980) 17

Sara S. Beale and William C. Bryson, *Grand Jury Law and Practice* (1984) 14

J.M. Beattie, *Crime and the Courts in England 1660-1800* (1986) 17

Julius Goebel and T. Raymond Naughton, *Law Enforcement in Colonial New York* (1944) 13

I Frederick Pollack and Frederick Maitland, *The History of English Law* (2d ed. 1923) 14

5 J. Moore, *Federal Practice* (2d ed. 1995) 16

2 David B. Smith, *Prosecution and Defense of Forfeiture Cases* (1992) 15

Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* (1960) 16

Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 Am. Crim. L. Rev. 239 (1993) 14

1 Jour. Cong. 93 (Oct. 21, 1774) 16

S. Rep. No. 225, 98th Cong., 1st Sess. (1983) 5, 6

H.R. Rep. No. 247, 94th Cong., 1st Sess. (1975) 19

No. 94-7427

In The

Supreme Court of the United States

October Term, 1995

JOSEPH V. LIBRETTI, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONER

I. RULE 11(f) REQUIRES THE DISTRICT COURT TO SATISFY ITSELF THAT THERE IS A FACTUAL BASIS FOR THE FORFEITURE PART OF A GUILTY PLEA

Petitioner's opening brief showed that the Federal Rules of Criminal Procedure treat criminal forfeiture as a substantive charge, and that Rule 11(f) requires the court to satisfy itself that there is a factual basis for a defendant's plea to criminal forfeiture charged in an indictment or information.

1. In response, the government seeks to recharacterize this part of petitioner's plea as nothing more than a sentencing stipulation. In the government's view, paragraph 10 of petitioner's plea agreement "is best understood as petitioner's stipulation that all of the property

he owned met the requirements for forfeiture under 21 U.S.C. 853." U.S. Br. 31.

Neither the Sentencing Guidelines nor the text of the plea agreement support the government's contention that paragraph 10 should be characterized as a sentencing "stipulation." The Guidelines provide that a plea agreement may be accompanied by "a written *stipulation of facts* relevant to sentencing." U.S.S.G. § 6B1.4(a) (emphasis added). Paragraph 10 of the plea agreement, which states that petitioner "agrees to transfer [to the government] his right, title and interest in all of his assets," does not establish any *facts* that are relevant to sentencing. As noted in his opening brief, petitioner contests the effect of paragraph 10.[1] Assuming that it operates as concession of forfeitability, it is analogous to a concession of guilt, not a sentencing stipulation. The court of appeals interpreted paragraph 10, like a guilty plea, to state an ultimate legal conclusion, not to stipulate one or more of the subsidiary facts that might bear on the correct sentence.

Moreover, the government's characterization of forfeiture as exclusively a matter of sentencing finds no support in the laws governing the calculation and imposition of sentences, for these laws make no provision for

---

[1] The government's characterization of paragraph 10 ignores two other paragraphs of the plea agreement, which cast it in quite a different light. *See* Pet. Br. 23-24 (discussing paragraphs 2 and 9, as well as the district court's ambiguous and misleading statements at the Rule 11 hearing). Although the court of appeals did conclude that petitioner intended to forfeit all of his property without any further proceedings, it should be noted that the district court made no findings concerning petitioner's intent, and no record was developed on this point. Petitioner contends that he understood the agreement to provide for further findings to determine which assets were subject to forfeiture. *See* Pet. Br. 24-25. In any event, neither court below made any finding that petitioner intended to stipulate that his property "met the requirements" of Section 853.

criminal forfeiture. The Sentencing Guidelines simply provide that other laws govern forfeiture procedures, stating that "[f]orfeiture is to be imposed upon a convicted defendant *as provided by statute*." U.S.S.G. § 5E1.4 (emphasis added). The existing sentencing procedures contain no mechanism to assemble information regarding criminal forfeiture. Information relevant to sentencing is assembled by the presentence investigation and report. The content of the presentence investigation report is governed by Rule 32(b)(4) of the Federal Rules of Criminal Procedure, which develops only the facts necessary for Guidelines sentencing and restitution.[2] Rule 32(b)(4) neither mentions forfeiture nor authorizes an inquiry into the facts necessary to determine the propriety of forfeiture, such as the proceeds of the offense and property derived from those proceeds, the property used to facilitate the offense, and any basis for forfeiting substitute assets.

The rationale for omitting forfeiture from the sentencing laws and procedures becomes clear upon review of the Federal Rules regulating criminal forfeiture, which require forfeiture to be treated as a substantive charge rather than a mere matter of sentencing. Rule 7(c)(2) of the Federal Rules of Criminal Procedure requires that criminal forfeiture be alleged in the indictment. There is, of course, no similar requirement for matters relevant to sentencing. Rule 31(e) requires a special jury verdict on

---

[2] Fed. R. Crim. P. 32(b)(4) provides that the report of the presentence investigation shall contain 1) information concerning the defendant's history and characteristics (including prior criminal history and financial information pertinent to his ability to pay a fine or restitution); 2) the Guidelines classification of the defendant and the offense and the suggested sentencing range; 3) any pertinent policy statements issued by the Sentencing Commission; 4) information regarding the impact of the offense on any victims; 5) information regarding relevant non-prison programs and resources; and 6) other information required by the court.

the issue of forfeiture. Sentencing matters, in contrast, are determined by the judge, not the jury.[3] Rule 32(d) provides for a judgment of forfeiture. Sentencing matters, such as the amount of a drug involved in a transaction, are not embodied in the judgment.

The contrast between the procedural rules governing forfeiture and those governing sentencing is not accidental. To the contrary, the draftsmen of the Federal Rules rejected a proposal to treat criminal forfeiture as a matter of sentencing, adopting instead Rules 7(c)(2), 31(e), and 32(d). *See* Pet. Br. 16-19. The government's arguments would have been correct if the alternative proposal had been adopted, but it was not.

2. Despite the government's suggestions to the contrary, petitioner's argument fits squarely within the language of Rule 11(f). Rule 11(f) requires a factual basis for the defendant's "plea," and the terms of any plea must be determined by reference to the charges against the defendant as stated in the indictment, and by the laws that determine what must be alleged in the indictment and proved at trial. For example, use of a firearm in the commission of an offense may be defined as an element of the offense that must be alleged in the indictment, proved at trial, and for which there must be a factual basis, or it may be defined by the legislature as a matter merely for sentencing. *See McMillan v. Pennsylvania*, 477 U.S. 79, 89-90 (1986) (although "many legislatures have made possession of a weapon an element of various

---

[3] *See* 28 U.S.C. § 994(a)(1) (1988) (Sentencing Commission to promulgate guidelines for use of sentencing court); U.S.S.G., Ch. 1, Pt. A, intro. comment (court must select sentence within guidelines range, but may depart outside the prescribed range if case presents atypical features). In capital cases, however, jury sentencing is authorized. 18 U.S.C. § 3593(b) (capital sentencing hearing to be conducted before jury unless defendant moves for hearing before court and government consents). For a discussion of the jury's function in death penalty cases, see *infra* p. 17.

aggravated offenses," Pennsylvania statute treats possession as a sentencing factor which need not be proved beyond a reasonable doubt or tried by jury). Similarly, the legislature's treatment of criminal forfeiture determines whether it must be treated as a substantive charge or merely a matter of sentencing. By enacting rules requiring that forfeiture be charged in the indictment, proved to the jury, and embodied in the judgment, Congress defined forfeiture as a substantive charge, not merely a matter of sentencing. The absence of any provision for forfeiture in the sentencing laws and procedures confirms the conclusion that Congress intended to treat forfeiture as a substantive charge.

Criminal forfeiture is unquestionably a procedural oddity. It is, of course, ultimately a criminal punishment and a part of the defendant's sentence. But under the Federal Rules of Criminal Procedure forfeiture is, nonetheless, treated as a substantive charge that must be included in the indictment and submitted to the jury. As such, forfeiture is also properly a matter to which the defendant must plead, and for which a factual basis must be established. As explained in a Senate report that accompanied amendments to the RICO and CCE forfeiture provisions and new forfeiture provisions applicable to other drug offenses, federal criminal forfeiture "is an *in personam* proceeding against the defendant in a criminal case *and* is imposed as a sanction against the defendant upon his conviction." S. Rep. No. 225, 98th Cong., 1st Sess. 193 (1983) (emphasis added). While the government's brief (U.S. Br. 28) emphasizes the last part of this sentence, it ignores the first part, which recognizes that criminal forfeiture is a separate "*in personam* proceeding" or charge against the defendant within the criminal case. *Id.*

The government's reliance on selected passages of legislative history and statutory text (*see* U.S. Br. 20-21, 28) implicitly recognizes that this Court must look outside Rule 11 to answer the question whether Congress has treated criminal forfeiture as a substantive charge or

as a matter of sentencing. The material cited by the government is not on point, however, for none of it addresses the proper treatment of criminal forfeiture for procedural purposes, and none of it is inconsistent with the position petitioner advances. The only provisions that characterize forfeiture for procedural purposes are Rules 7(c)(2), 31(e), and 32 of the Federal Rules of Criminal Procedure, and these rules require criminal forfeiture to be treated as a substantive charge. Indeed, one of the Congressional reports upon which the government relies endorsed the procedural requirements of the Federal Rules, demonstrating that Congress intended these rules to govern and saw no inconsistency between forfeiture's punitive character and the requirement that it be treated as a substantive charge for procedural purposes.[4]

Petitioner's interpretation of Rule 11(f) is also consistent with this Court's prior decisions and the legislative history of the rule. Although this Court's decision in *McCarthy v. United States*, 394 U.S. 459 (1969), describes the factual basis requirement of Rule 11 without mentioning forfeiture, the appropriate treatment of forfeiture was never an issue in that case because it was decided before the 1970 legislation authorizing forfeiture. Similarly, the Advisory Committee Note cited by the government (U.S. Br. 16-17) was drafted four years before the landmark forfeiture legislation. Though this Note does not mention forfeiture, it does indicate that the district court is to find

---

[4] The report states:

> Criminal forfeiture must be alleged in the information or indictment. If the defendant is found guilty of the underlying offense, then a special verdict must be returned with respect to the forfeiture allegations and a judgment of forfeiture is entered against the defendant. Only then is the government authorized to seize the property.

S. Rep. No. 225, 98th Cong., 1st Sess. 193-94 (1983) (footnote citing Fed. R. Crim. P. 31(e) and 32 omitted), *cited in* U.S. Br. 21, 28.

a factual basis for the charge or charges to which the defendant pleads. Once Congress altered the definition of the charge that must be included in the indictment and proved by the government as part of the case it must present to the jury, the definition of the plea necessary to resolve the case followed suit, encompassing forfeiture. Since the scope of the factual basis requirement turns on the nature of the charge and the corresponding plea, it too now encompasses forfeiture.

3. The government responds to petitioner's argument that forfeiture is subject to abuse by arguing (U.S. Br. 29) that "any potential for abuse of forfeiture authority should be addressed through case-by-case inquiry into actual overreaching, not through the formulation of broad prophylactic rules." Petitioner agrees. The factual basis determination is just such a case-by-case inquiry, wholly unlike the broad prophylactic remedy at issue in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), where the defense sought an absolute prohibition on the forfeiture of funds that might be used to pay defense counsel. The factual basis requirement will provide the court with information necessary to ensure that the government has not exceeded its statutory forfeiture authority. It will also provide information necessary to ensure that the defendant understands the scope of the forfeiture being sought and the facts necessary to support that forfeiture, and knowingly and voluntarily agrees to the forfeiture under those conditions. *See* Pet. Br. 14-15.

The government has suggested no alternative that would provide the necessary safeguard against government overreaching or simple mistake. As noted above, the government contends that paragraph 10 of petitioner's plea agreement forfeited all of his property (including legitimately obtained property) and was an appropriate stipulation concerning a sentencing matter. In the absence of a factual basis inquiry, there will be no mechanism for determining whether there is a factual foundation for such agreements. The government notes (U.S. Br. 32) that the court is not bound by stipulations,

but may determine the facts relevant to sentencing with the aid of the presentence report. However, as discussed above, *supra* p. 3, the presentence report does not address the questions upon which forfeiture turns.

This case illustrates the absence of any mechanism for determining the factual basis for criminal forfeiture if it is treated merely as a part of sentencing. The presentence report in this case did not address the factual predicates for forfeiture: it did not identify particular property as proceeds or derived from proceeds; it did not identify property used to facilitate the offense; it did not calculate the total proceeds; and it did not identify a factual basis for treating other property as substitute assets. The transcripts from the Rule 11 and sentencing hearings give no indication that the district court sought to identify the facts supporting forfeiture. The evidence relied upon by the government in support of its claim that a factual basis indeed exists (U.S. Br. 33) was introduced *after* sentencing at the ancillary third-party hearing, including the first and only evidence of the government's calculation of the total "proceeds" petitioner derived and the rationale for the forfeiture of legitimately obtained as well as tainted property. The government's brief glosses over the fact that after hearing this additional evidence the district court ruled that further evidentiary proceedings would be necessary to support the forfeiture order in the plea agreement, since the "[f]orfeiture statutes do not mandate forfeiture of property purchased with legitimate funds." J.A. 309. The district court also found the existing evidence insufficient to support the government's substitute assets theory, observing that the government had presented no more than unsubstantiated suspicions. J.A. 289 ("You might suspect that, but can you proove [sic] it?").

4. The government's contention (U.S. Br. 36) that a factual basis inquiry is an "inapt method of revealing hidden misunderstandings between the parties" is squarely inconsistent with the Advisory Committee Note that accompanied the adoption of the factual basis requirement. In a passage upon which the government

itself relies in an earlier portion of its brief (U.S. Br. 16), the Note explains that the factual basis inquiry is intended to "e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." 18 U.S.C. App., Notes of Advisory Committee on Rules – 1966 Amendment. In other words, the factual basis requirement will make clear when a defendant is pleading guilty because of such a misunderstanding. Moreover, the introductory signal "e.g." indicates that the factual basis requirement is intended to bring to light other forms of misunderstanding as well.

The Advisory Committee and Congress did not accept the government's argument that any judicial inquiry into the facts underlying the plea agreement would defeat the very purpose of such agreements, which the government says is to "relieve the litigants of the need to persuade the court that the stipulated facts are true." U.S. Br. 36. The factual basis requirement reflects the view that if the parties cannot identify any factual support for their plea agreement at the Rule 11 hearing, the defendant's plea is likely the result of some fundamental misunderstanding which should be brought to light. That insight applies equally to a defendant's admission that he committed an offense charged in the indictment and to his admission that property named in the indictment is subject to forfeiture.

Petitioner's opening brief describes how such a fundamental misunderstanding occurred in his own case. Pet. Br. 21-25. The government responds that a genuine mistake would have been raised promptly in the district court, and, further, that the court of appeals made "a detailed examination of the record" and found there was no misunderstanding. U.S. Br. 36. The problem with the government's argument is that one cannot raise a misunderstanding of which he is not yet aware. For precisely this reason, Rule 11(f) requires an inquiry by the court in order to flush out such latent misunderstandings.

In petitioner's case, there was no point prior to the sentencing hearing when any misunderstanding concerning forfeiture would naturally have come to light. It was only at the end of the sentencing hearing, after the judge stated the proceedings were at an end, that it became evident there would be no hearing on the issue of forfeiture. At that point petitioner objected that there was no factual support for the forfeiture of all of his property. J.A. 154. Since petitioner raised this objection pro se on the spur of the moment, it is unrealistic to fault him, as the government does (U.S. Br. 36), for failing to describe his objection more fully. Moreover, since petitioner was given no opportunity to develop a record supporting this claim, and the district court made no findings on the issue of petitioner's intent, the court of appeals was in no position to make its own findings regarding petitioner's intentions. Petitioner's case thus demonstrates the need for a mechanism to bring to light in the district court fundamental misunderstandings regarding the forfeiture portion of plea agreements. A factual basis inquiry would have required a description of the property to be forfeited and a brief explanation why it was forfeitable, providing a natural point at which any difference in understanding between petitioner and the prosecution would be evident.

5. Forfeiture, unlike any other aspect of sentencing, has a direct impact upon the property rights of third parties. The government's brief gives scant attention to the interests of third parties, brushing them aside with the comment that they are adequately protected by the ancillary third-party procedures under 21 U.S.C. § 853(n). U.S. Br. 34-35. However, as petitioner has shown (Pet. Br. 34-39), the procedures deemed adequate by the government provide no relief for some innocent owners whose rights may be extinguished by forfeiture pursuant to a plea agreement. The government's interpretation of Rule 11(f) permits the property rights of third parties to be disturbed without even the minimum safeguard of a factual basis showing. The government's brief contains no reply to the evidence (Pet. Br. 39) that Congress

restricted the procedural protections afforded to third parties in the ancillary hearings in reliance on the firm evidentiary basis for forfeiture that would be required before conviction.

The government relies heavily (U.S. Br. 32) on "the usual premise of an adversary system . . . that stipulations to which the parties agree are presumptively valid." Because that presumption focuses exclusively on the parties who made the stipulation, it takes no account of the interests of third parties and provides no justification for allowing their rights to be adversely affected when no factual basis has been shown. *See* Pet. Br. 34-35 (defendants have no incentive to protect the property rights of third parties). The rights of third parties provide an additional reason why Congress did not treat forfeiture as merely a matter of sentencing.

6. The government relies upon a substitute assets theory to justify the forfeiture in this case, but a vital element is missing from this discussion. The government contends (U.S. Br. 33-34) that it was entitled to forfeit substitute assets in the amount of one million dollars because a state agent had estimated that petitioner had earned at least one million dollars from drug trafficking. The district court correctly rejected this argument at the third-party hearing, because the government did not meet one of the statutory prerequisites for the forfeiture of substitute assets.

Section 853 establishes a two-part test for forfeiture of substitute assets. First, the government must identify forfeitable property under Section 853(a), which reaches, *inter alia*, the "proceeds" of drug trafficking. If the government wishes to forfeit substitute assets, rather than the proceeds themselves, it must also demonstrate that it has satisfied at least one of five additional criteria described in 21 U.S.C. § 853(p)(1)-(5). In the district court, the government's substitute assets claim failed at this second step, when the district court rejected as unproven speculation the government's claim that petitioner had secreted proceeds. J.A. 289. The government's brief does

not address this deficiency. It treats evidence concerning proceeds as a sufficient basis for the forfeiture of substitute assets, despite the requirements of 21 U.S.C. § 853(p)(1)-(5). Adoption of the government's arguments would radically expand the reach of Section 853(p), transforming it into authority permitting forfeiture of estate. Congress clearly did not authorize forfeiture of estate. *See* Pet. Br. 29-31.

7. At bottom, the government's argument is that petitioner accepted this bargain and should not now be heard to complain. *See* U.S. Br. 36-37, 49. This argument ignores the statutory – and ultimately constitutional – limitations on the plea agreements into which the government may enter. It is well established that a plea agreement cannot confer upon the sentencing court authority to impose an illegal sentence. *See, e.g., United States v. Snider*, 957 F.2d 703, 707 (9th Cir. 1992) (per curiam) ("plea agreements do not provide authority for a sentencing court to impose punishment in excess of the maximum provided by statute"); *United States v. Guardino*, 972 F.2d 682, 687-88 (6th Cir. 1992); *United States v. Rice*, 954 F.2d 40, 43 (2d Cir. 1992) ("a plea agreement obviously could not authorize a judge to impose whatever punishment the government and the defendant agreed to"). As the court of appeals recognized in *United States v. Snider*, 957 F.2d at 706-07, the proposition that " 'a deal is a deal' " may govern civil agreements, but it cannot authorize the court to impose a criminal sentence for which there is no statutory authorization. Adherence to that principle in the context of forfeiture is critical, because the government's financial needs may predispose it to abuse its authority. Rule 11(f)'s factual basis requirement provides the only mechanism that can prevent the government from exceeding the statutory limitations on forfeiture in guilty plea cases.

II. THE RIGHT TO A JURY DETERMINATION OF CRIMINAL FORFEITURE CAN BE EXTINGUISHED ONLY BY A KNOWING AND INTELLIGENT WAIVER

1. Petitioner's opening brief demonstrates the uniform English and colonial practice of submitting the issue of criminal forfeiture to the jury, and that this historic practice is embraced in the Sixth Amendment. Pet. Br. 42-44. The government seeks to minimize the importance of the historic record, arguing (U.S. Br. 40) that the jury's "limited role was to determine what assets the defendant owned," and that this "modest function" was not deemed a fundamental right of the defendant. The only authority the government cites in support of this argument is a brief passage in a student note.[5] Neither this note nor the government's brief responds to the evidence (Pet. Br. 43) that English and colonial juries frequently found that the accused owned no property despite their knowledge of such property. This evidence demonstrates that in criminal forfeiture cases the jury served its constitutional function of checking government oppression and abuse.[6]

---

[5] The only authority the note cites in support of this position is Julius Goebel and T. Raymond Naughton, *Law Enforcement in Colonial New York* (1944). Goebel and Naughton speculated that the requirement of a jury finding of the offender's forfeitable property "was *possibly* intended to simplify the settlement of Crown rights." *Id.* at 711 (emphasis added). They cited no authority in support of this passing comment.

[6] The jury's power to temper the law with its own sense of fairness and justice is an important feature of our constitutional system, with deep roots in English and colonial history. One of the earliest reported examples is *Bushell's Case*, 124 Eng. Rep. 1006 (1670), named after the foreman of the jury that was fined and held in contempt after it acquitted William Penn and William Meade. The court granted Bushell's habeas corpus petition, accepting his contention that jurors could not lawfully be detained merely because their verdict was unacceptable to the

Even if the government could produce some evidence that the jury once served only as a device to facilitate forfeiture by identifying properties to be seized, the metamorphosis of the jury in forfeiture cases would merely parallel its development in other contexts. For example, the original purposes of the grand jury "were to increase the number of criminal prosecutions, to enhance the king's authority, and indirectly to raise revenue for the Crown, which received the property forfeited by persons convicted of crimes." Sara S. Beale and William C. Bryson, *Grand Jury Law and Practice* § 1:02, at 5 (1984) (endnotes omitted).[7] The grand jury's eventual development into an independent institution that won praise as an important safeguard of individual liberty demonstrates that such a lay body, once constituted, may take on functions not originally foreseen.

The ability to resist government oppression is the hallmark of the jury and a primary justification for the jury clause of the Sixth Amendment and the grand jury clause of the Fifth Amendment. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) (jury a safeguard against corrupt or overzealous prosecutor and complacent or biased judge); *Wood v. Georgia*, 370 U.S. 375, 390 (1962)

---

trial judge. Other well known examples of jury independence during the colonial period were the acquittals of John Peter Zenger (who was represented by Alexander Hamilton) and of the defendants charged in connection with the Boston Tea Party. For a general discussion of jury nullification, see Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 Am. Crim. L. Rev. 239 (1993).

[7] Indeed, some scholars trace the heritage of both the grand and petit jury back to a jury-like body employed by William the Conqueror to compile the Domesday Book, which listed all landowners and showed the value and extent of their holdings. I Frederick Pollack and Frederick Maitland, *The History of English Law* 143 (2d ed. 1923). This appears to be a close corollary of the function attributed by the government to the jury in forfeiture cases.

(grand jury a primary security against hasty, malicious, and oppressive prosecutions). By refusing to identify forfeitable property, common law juries performed this function, and this common law heritage shows that the right to have a jury determine criminal forfeiture is an aspect of the Sixth Amendment right to trial by jury.[8] *Cf. Greene v. Briggs*, 10 F. Cas. 1135, 1142 (C.C.D.R.I. 1852) (No. 5,674) (trial by jury required under state constitution if statute permits criminal forfeiture).

2. The Framers intended to preserve the jury as it existed at common law (Pet. Br. 44-45), where it served as an important safeguard in forfeiture cases. The American colonists recognized the importance of requiring a jury

---

[8] The government suggests (U.S. Br. 21 n. 8) that recognition of a Sixth Amendment right to a jury trial of criminal forfeiture would necessarily require that forfeitability be established beyond a reasonable doubt. Yet the decisions cited by the government, *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993), and *United States v. Gaudin*, 115 S. Ct. 2310 (1995), had no occasion to address whether forfeiture might be an exception to the general rule that the jury verdict required by the Sixth Amendment is a verdict beyond a reasonable doubt. In any event, recognition of a requirement of proof beyond a reasonable doubt in criminal forfeiture proceedings would impose no undue burden on the government. RICO forfeitures presently require proof beyond a reasonable doubt. *E.g., United States v. Pelullo*, 14 F.3d 881, 901-06 (3d Cir. 1994). CCE forfeitures were originally subject to the requirement of proof beyond a reasonable doubt, though several courts have concluded that legislation enacted in 1984 reduced the government's burden to a preponderance. For a discussion of these cases and an argument that Section 853 did not alter the burden of proof, see 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 14.03 (1992) (since Congress rejected earlier bill to lower burden of proof for criminal forfeiture and enacted other explicit provisions regarding burden of proof, courts have erred in assuming that Congress altered overall burden of proof for criminal forfeiture without any express statutory language or reference to this action in the legislative history).

trial in cases that might lead to civil forfeiture. Parliament extended the jurisdiction of the admiralty courts to cases involving seizures under the trade and navigation acts in response to the nullification of these laws by local juries, and this extension of admiralty jurisdiction led to "vigorous protests in America." 5 J. Moore, *Federal Practice* ¶ 38.35[2] (2d ed. 1995); *see* Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* 16 (1960) (most common sanction for violation of trade laws was forfeiture of ships and cargoes). One of the chief complaints of the First Continental Congress was English revenue statutes that "subvert[ed] . . . the right of trial by jury, by substituting in their place trials in Admiralty and Vice-Admiralty courts, where single Judges preside, holding their Commissions during pleasure." 1 Jour. Cong. 93 (Oct. 21, 1774) (message to the inhabitants of the British colonies); *see also Jackson v. The Steamboat Magnolia*, 61 U.S. (20 How.) 296, 322, 331 (1857) (Campbell, J., dissenting) (one of the reasons colonists took up arms was their opposition to "the enlarged authority of [admiralty] courts, their interference with the common law right of trial by jury, and their offensive use of the laws and course of proceeding adopted from Roman tyrants").

The government has advanced no reason to believe that the colonists who protested the absence of a jury in forfeiture proceedings before the admiralty courts would have agreed with the suggestion (U.S. Br. 40) that the right to have criminal forfeiture determined by a jury is not of constitutional importance. There is no merit to the government's suggestion (U.S. Br. 39-40 & n. 15) that the jury's role was constitutionally insignificant because criminal forfeiture was mandatory rather than discretionary. Civil forfeiture also was mandatory. The jury's function was the same in civil and criminal forfeiture cases, and the Framers' actions indicate their understanding that this function was of constitutional magnitude. *Cf. United States v. The Betsey and Charlotte*, 8 U.S. (4 Cranch)

443, 446 n. 1 (1808) (admiralty jurisdiction protected governmental revenues, avoiding "great danger" of "caprice of juries").

3. The decisions holding that the Sixth Amendment does not require the jury to impose the death sentence (U.S. Br. 39-41) have no bearing on this case. The death penalty cases demonstrate only that the contours of the right guaranteed by the Sixth Amendment are determined by history rather than contemporary usage. The statutes giving the jury sentencing authority in death penalty cases are of relatively recent origin. The first statute providing for jury discretion in capital murder cases was enacted by Tennessee in 1838. American Law Institute, *Model Penal Code and Commentaries* § 210.6 commentary, at 129 (1980). Prior to that time, death was the exclusive and mandatory penalty for many crimes. *Id.* The mandatory nature of the death penalty was qualified by the sentencing judge's authority to reprieve the defendant and recommend that he be pardoned. *See* J.M. Beattie, *Crime and the Courts in England 1660-1800* 409, 420 (1986). Since the jury had no similar discretion, it could shield defendants from the death penalty only by finding them not guilty or guilty only of a lesser offense. *See id.* at 406, 408, 419-21.

Accordingly, the death penalty decisions cited by the government do no more than keep the Sixth Amendment within its historic boundaries. The same analysis applies to *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), since there is no historic precedent for requiring the jury to find facts that determine the sentence to be imposed within the range provided for by the offense. *McMillan* and the death penalty cases have no bearing where, as here, the common law required submission of the matter in question to the jury.

4. If this Court concludes that the Sixth Amendment does not protect the right to a jury trial on forfeiture, the government argues (U.S. Br. 44-49) that the right to a special jury verdict under Rule 31(e) is no different than a myriad of other rights that are extinguished by a guilty

plea, even if the defendant is never made aware of those rights. This argument ignores the distinctions drawn by history, by this Court's waiver decisions, and by the text of Rule 11, all of which recognize the fundamental character of the right to a jury determination and demonstrate that any waiver of that right under Rule 31(e) must be knowing and voluntary.

One group of cases relied on by the government (U.S. Br. 46) involves constitutional rights. As this Court explained in *Schneckloth v. Bustamonte*, 412 U.S. 218, 236-37 (1973), the knowing and intelligent waiver standard has not been extended to all constitutional rights, but has generally been restricted to rights required "to protect a fair trial and the reliability of the truth-determining process." The right to trial by jury is one of these rights, and it is waived only by an intentional extinguishment. *See id.* at 237. The cases cited by the government, in contrast, involve constitutional rights, such as the Double Jeopardy Clause and the Fourth Amendment exclusionary rule, which are not essential to the truth-determining process. The same is true of many of the statutory rights cited by the government (U.S. Br. 47-48), such as statutes of limitation, the Speedy Trial Act, and the Interstate Agreement on Detainers; they too are waived by a guilty plea, regardless of the defendant's knowledge.

The right to a jury trial is also readily distinguishable from the other statutory provisions noted by the government (U.S. Br. 47), including the discovery provisions of the Federal Rules of Criminal Procedure, the Jencks Act, and the Federal Rules of Evidence. These modern provisions stand in stark contrast to the right to jury trial, which has been identified as a fundamental right since our nation's founding, and is recognized in the law of every state. Our history as a nation draws a clear distinction between the right to a jury determination and the many other statutory rights of recent origin that are not deemed so fundamental that they require a knowing and intelligent waiver. *See United States v. Robinson*, 8 F.3d 418, 421-22 (7th Cir. 1993).

Equally important, Rule 11 of the Federal Rules of Criminal Procedure provides a clear basis for distinguishing between the various constitutional and statutory rights cited by the government and the right to have criminal forfeiture decided by a jury. In light of the requirements in Fed. R. Crim. P. 11(c)(3) & (4), it is not necessary to reach the Sixth Amendment issue to determine that the knowing and intelligent waiver standard applies.

The plain language of Rule 11(c) requires a knowing and intelligent waiver of the right to a jury determination of forfeiture under Rule 31(e). Rule 11(c) requires the court to "address the defendant personally in open court and inform the defendant of, and determine that the defendant understands" both that he has "the right to be tried by a jury," Fed. R. Crim. P. 11(c)(3), and that "there will not be a further trial *of any kind*" if he pleads guilty, Fed. R. Crim. P. 11(c)(4) (emphasis added). The phrase "trial of any kind" plainly includes the trial leading to the jury verdict required by Rule 31(e). Since Rule 11(c) requires the court to inform the defendant of his rights under Rule 31(e) and to determine whether he intends to waive those rights by pleading guilty, it requires a knowing and intelligent waiver of the right to a jury determination of criminal forfeiture.

Ignoring the plain language, the government advances a crabbed interpretation of Rule 11(c) that limits it to warnings that are found to be constitutionally required. The government argues (U.S. Br. 42) that its interpretation is required by the legislative history, but the legislative report it cites states only that Rule 11(c) was intended to "include" all of the warnings that were constitutionally required. H.R. Rep. No. 247, 94th Cong., 1st Sess. 7 (1975). This mild statement provides no basis for disregarding the express terms of Rule 11(c), including the phrase "trial of any kind."

Since petitioner's claim rests on the historic recognition of the jury's unique importance and the text of Rule 11, there is no basis for the government's concern (U.S.

Br. 49) that acceptance of petitioner's claims would "replace the relative certainty of Rule 11(c) with a free-form inquiry" into what rights should be deemed fundamental. Rule 11(c) itself reflects the fundamental nature of the jury trial right upon which petitioner relies, and the rule itself imposes the requirement of a knowing and intelligent waiver.

5. The government has questioned (U.S. Br. 38 n. 14) what relief petitioner seeks. As stated in petitioner's main brief (Pet. Br. 50), if this Court holds that petitioner has not waived his right to a jury determination on forfeiture, the next step should be a remand to the district court to determine whether petitioner is now willing to make such a waiver. It is not necessary for this Court to reach the question of the relief to be afforded if no waiver can be obtained upon remand, since petitioner may make such a waiver if the parties reach an agreement regarding the scope of the forfeiture.

CONCLUSION

For these reasons, as well as the reasons set forth in petitioner's main brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

SARA SUN BEALE
(Appointed by this Court)
Counsel of Record
Duke University School of Law
Science Drive & Towerview Road
Post Office Box 90360
Durham, N.C. 27708-0360
Telephone: 919-613-7091
Counsel for Petitioner

Of Counsel:
PAUL K. SUN, JR.
SMITH HELMS MULLISS & MOORE
316 West Edenton Street
Post Office Box 27525
Raleigh, N.C. 27611
Telephone: 919-755-8720

Supreme Court, U.S.
FILED
JUN 30 1995
OFFICE OF THE CLERK

(9)

No. 94-7427

In The Supreme Court of the United States October Term, 1994

JOSEPH V. LIBRETTI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF OF FORFEITURE ENDANGERS AMERICAN RIGHTS FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

BRENDA GRANTLAND
Forfeiture Endangers American Rights Foundation
265 Miller Avenue
Mill Valley, CA 94941
(415) 380-9108

35pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. A GUILTY PLEA TO A SUBSTANTIVE COUNT REQUIRES A MEETING OF THE MINDS AND THE DEFENDANT'S VOLUNTARY RELINQUISHMENT OF HIS RIGHT TO TRIAL 14

II. CRIMINAL FORFEITURE IS A SUBSTANTIVE COUNT JUST LIKE ANY CRIMINAL SUBSTANTIVE COUNT, FOR PURPOSES OF THE CONSTITUTION 17

A. This Court has previously recognized that criminal forfeiture is a substantive count 22

B. Characteristics of a substantive count of criminal forfeiture under 21 U.S.C. §853 23

III. THIRD PARTY RIGHTS ARE UNDERMINED WHEN THE COURT ACCEPTS A PLEA TO A CRIMINAL FORFEITURE COUNT WITHOUT ASCERTAINING THAT THERE IS A FACTUAL BASIS FOR THE FORFEITURE . . . 26

CONCLUSION 28

CASES

Alexander v. United States, __ U.S. __, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) . . . 9, 11, 14

Austin v. United States, __ U.S. __, 113 S.Ct. 2801, 125 L.Ed.2d 448 (1993) 9, 11

Caplin & Drysdale v. United States, 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989) 22-23

Henderson v. Morgan, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976) 14-16

Smith v. O'Grady, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859 (1941) 15

Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) 17

Tollet v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) 14

United States v. Bieri, 21 F.3d 819, (8th Cir. 1994) 12

United States v. Boatner, 966 F.2d 1575 (11th Cir. 1992) 12

United States v. Elgersma, 971 F.2d 690, 693 (11th Cir. 1992) 12

United States v. Garrett, 727 F.2d 1003 (11th Cir. 1984) 25

United States v. Hernandez-Escarsega, 886 F.2d 1560, 1577 (9th Cir. 1989) 12

United States v. Herrero, 893 F.2d 1512, 1541-42 (7th Cir.), cert. denied, 496 U.S. 927, 110 S.Ct. 2623, 110 L.Ed.2d 644 (1990) 12

United States v. James Daniel Good Real Property, __ U.S. __, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) 9, 10

United States v. Libretti, 38 F.3d 523, 529 (10th Cir. 1994) 5, 6, 17, 19-21

United States v. Reckmeyer, 786 F.2d 1216 (4th Cir.) cert. denied, 479 U.S. 850, 107 S.Ct. 177, 93 L.Ed.2d 113 (1986) . . . 18, 21

United States v. Sandini, 816 F.2d 869, 875 (3rd Cir. 1987) 12

United States v. Smith, 966 F.2d 1045, 1052 (6th Cir. 1992) 12

Witte v. United States, __ U.S. __, __ S.Ct. __, __ L.Ed.2d __ (June 14, 1995) 23

CONSTITUTION, STATUTES AND RULES

Fifth Amendment 12, 13, 26

Sixth Amendment 17

18 U.S.C. §3572 13

21 U.S.C. §853 . . . . . 3, 16, 23-26

Federal Rules of Criminal Procedure, Rule 1B, 11

Federal Rules of Criminal Procedure, Rule 31(e) 24

MISCELLANEOUS

Amicus brief of Institute for Justice, *United States v. James Daniel Good Real Property*, ... 7, 10

Department of Justice, 1990 Annual Report for Department of Justice Asset Forfeiture Program 7

Henry Hyde, *Forfeiting Our Property Rights* (Cato Institute 1995) 9

"Federal Forfeiture Laws Need To Be Amended To Restore Due Process And Protect the Property Rights of Innocent People: F.E.A.R.'s Proposal For Reform," 2

NEWSPAPER AND MAGAZINE ARTICLES

Robert C. Bauman, "License To Steal -- Take It Away,"*National Review*, February 20, 1995 8

Jeff Brazil and Steve Berry, "Tainted Cash Or Easy Money?" *Orlando Sentinel*, June 14-17, 1992 8

Dennis Cauchon, "Forfeiture Law Called Biased, Reckless," *USA Today* October 1, 1992 8

John Dillin, "Government's Big Grab: Civil Forfeiture," *Christian Science Monitor*, September 28 & 30, 1993, October 1, 4 & 5, 1993 8

Steven B. Duke & Albert C. Gross, "Casualties of War," *Reason*, February 1994 8

Mark Flatten, "Policing For Profits," *Tempe (Arizona) Daily News Tribune*, November 21 - 26, 1993 8

Peter Gorman, "Forfeiture: The Seizing Of America," *High Times Magazine*, November & December 1992 8

Arthur S. Hayes, "Civil Forfeiture Laws Are Under Attack," *Wall Street Journal*, January 14, 1993 8

Richard Miniter, "Ill-Gotten Gains," *Reason Magazine*, August/September 1993 8

Mike O'Callaghan, "War On Drugs Hitting Innocent Citizens,"*Las Vegas Sun*, October 3, 1992 8

T. Poor and K. Rose, "Hooked On The Drug War," *St. Louis Post-Dispatch*, April 28 - May 5, 1991. 8

Andrew Schneider & Mary Pat Flaherty, "Presumed Guilty: The Law's Victims In the War on Drugs," *Pittsburgh Press*, August 11 - 16, 1991 August 18, 1991, December 22, 1991 8

Gary Webb, "The Forfeiture Racket" and "The Money Tree," *San Jose Mercury News*, August 29-30, 1993 8

No. 94-7427

In The
Supreme Court of the United States
October Term, 1994

JOSEPH V. LIBRETTI, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

BRIEF OF FORFEITURE ENDANGERS AMERICAN RIGHTS FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Forfeiture Endangers American Rights Foundation (F.E.A.R. Foundation) is a nonprofit organization to reform asset forfeiture laws to restore due process and protect property rights in the forfeiture process.

F.E.A.R.'s platform is set out in a position paper published in 1992.[1] We advocate criminal due process safeguards for all forfeitures, and enhanced protections for innocent owners and third parties. We seek an end to the practices of letting the seizing agencies benefit from the proceeds of property seized, and of letting federal agencies adopt state seizures.

Our membership is composed of concerned citizens, forfeiture victims, and lawyers. The concerned citizens active in our cause include doctors, writers, social scientists, professors, businessmen, and other professionals. A former U.S. Congressman serves on our Board of Directors. Individual lawyer/members have represented forfeiture victims in a wide range of constitutional issues regarding forfeiture law.

Our interest in this case is twofold. First, F.E.A.R. is concerned with the overwhelming numbers of forfeiture cases that are settled (or lost by default) prior to trial -- without *any* court determination of a factual basis for the forfeiture. We believe that too often this reflects the victims' unfair bargaining position, rather than the strength of the government's case. When the pretrial seizure of assets destroys the victims' financial ability to defend their property, victims often have no choice but give the government what it wants, whether forfeiture is factually justified or not. A government agency motivated to enhance forfeiture revenues should not be allowed to punish without judicial oversight.

---

[1] The paper, "Federal Forfeiture Laws Need To Be Amended To Restore Due Process And Protect the Property Rights of Innocent People: F.E.A.R.'s Proposal For Reform," is available from F.E.A.R.'s website on the Internet (http://www.calyx.com/~fear), on the "Legislation and Lobbying" page.

Secondly, the underlying principle in the Tenth Circuit's opinion -- that forfeiture is "merely punishment" and not a substantive offense -- has been used to reduce due process in criminal forfeitures. F.E.A.R. has fought long and hard to raise due process requirements in civil forfeiture cases. We do not want to see criminal forfeiture lose due process protections.

Broad principles are needed to guide the lower courts in providing the process that is due *all* forfeiture victims. Otherwise, every advance we make in one area of forfeiture law will be offset by an equal setback in another area, as government agencies struggle to maintain the stream of income upon which they have become dependent.

STATEMENT OF THE CASE

The facts are set out in petitioner's brief, and we will only briefly summarize them here.

Joseph V. Libretti pleaded guilty to operating a continuing criminal enterprise (hereafter "CCE"). The plea agreement specified "forfeiture of all known assets as prescribed in 21 U.S.C. §853 and assets which are discovered at any later time up to $1,500,000." Paragraph 9 required Libretti to identify all his assets used to facilitate criminal activity, and to complete financial disclosure forms identifying all assets. Paragraph 10 required him to transfer all "his right, title, and interest in all of his assets to the Division of Criminal Investigation of the Wyoming Attorney General" -- including, but not limited to specific property.

At the Rule 11 hearing, the judge advised Libretti that if he pleaded guilty he would waive the right to a jury trial, but did not explain that he had a right to trial by

jury on whether each asset was forfeitable. In advising Libretti of the potential punishment he was facing, the judge stated that "all the property that's described in Count 6 could be forfeited to the United States." When Libretti asked the judge whether the government could forfeit one and a half million dollars from him at any time, the court told him that property that was not drug tainted could not be forfeited.

After sentencing Libretti to 20 years inprisonment, 5 years supervised release, a fine, and community service, the court stated "I think I have no alternative but to grant the forfeiture order and it is hereby granted." Libretti objected that the court had failed to find a factual basis for the forfeiture of all his property.

After Libretti filed his notice of appeal, the court held hearings on third party claims to the forfeited property. At the first hearing, Libretti argued that the condominium should not have been included in the forfeiture order because it was not purchased with proceeds. The court allowed the sale, but ordered that the proceeds be retained to permit Libretti to assert any claims he might have.

At another third party hearing, Libretti's parents claimed a parcel of property that Libretti had deeded to them in exchange for the money they paid for Libretti's defense. His parents claimed the property was purchased with legitimate income from his employment. The court reserved ruling on this claim.

The government's evidence about the source of the assets showed that Libretti had legitimate income from employment as an accounting supervisor at General Chemical, as well as a firearms business. They contended that his illegal drug profits amounted to a million dollars or more, and that drug proceeds may have been

comingled with legitimate income in Libretti's bank accounts, and may have been invested in his firearms business.

Libretti testified that he had earned approximately $50,000 per year in salary from General Chemical, and that the government had seized untainted assets along with drug proceeds. Libretti's attorney argued that though the government had demonstrated probable cause for forfeiture, Libretti could prevail in defending assets from forfeiture if he could show by a preponderance of the evidence that the property was not tainted. (This is the standard for civil forfeiture -- not criminal forfeiture.)

The court agreed and stated the case would be remanded to a magistrate to determine which assets were forfeitable. Before the hearing was held, the court granted the government's motion to stay the factfinding hearing pending the appeal.

On appeal, Libretti argued that the plea agreement was vague and ambiguous, and that he had agreed only to forfeit those items of his property named in the indictment which were forfeitable under the criminal forfeiture statute. He stated that he would not have knowingly and voluntarily agreed to forfeit all of his property whether tainted or not. *United States v. Libretti*, 38 F.3d 523, 529 (10th Cir. 1994).

The Tenth Circuit held that the district court was deprived of jurisdiction to consider Libretti's claims once he had filed a notice of appeal. It then held that the court was not required by Rule 11 to find a factual basis for the forfeiture of the assets, because forfeiture was part of the sentence rather than a substantive offense. 38 F.3d at 528.

Reviewing the question of the voluntariness of the plea de novo, the Tenth Circuit held that the plea was knowing and voluntary and that Libretti "unambiguously forfeited all of his property."

> The district court's extraneous statements that defendant was only forfeiting assets listed in the CCE count of the indictment or from his drug trade do not establish that defendant did not knowingly and voluntarily forfeit all of his property. Rather, defendant agreed to forfeit all of his assets, including some that on their face had no connection with his drug dealings.... Nothing in the agreement limits the forfeiture to those assets with an established factual basis for forfeiture. *Libretti*, 38 F.3d at 530.

SUMMARY OF ARGUMENT

This case presents two issues regarding the validity of a guilty plea forfeiting a defendant's property:

(1) whether the judge is required to inform the defendant that he has a right to trial on the issue of the forfeitability of the property, and

(2) whether the judge must find a separate factual basis for each count to which the defendant is pleading guilty, including criminal forfeiture counts.

Central to the determination of both issues is the question of whether a criminal forfeiture count is a substantive count, or merely an additional sanction for a separate criminal offense.

ARGUMENT

In 1984, the Omnibus Crime Control Act overhauled the federal asset forfeiture laws by vastly expanding police seizure powers, creating a host of new forfeitable offenses, and allowing the seizing agencies to keep the proceeds of their seizures.

As the Institute for Justice pointed out in their amicus brief in *United States v. James Daniel Good Real Property*, p. 11:

> After law enforcement agencies were granted a direct financial incentive to initiate and prosecute forfeiture actions, the use of the new statute and revenues generated by civil forfeiture skyrocketed. Proceeds from civil forfeiture increased from $27 million in 1985 to $644 million in 1991, *an increase of over 1500 percent. See* U.S. Dep't of Justice, Federal Forfeiture of the Instruments and Proceeds of Crime: The Program in a Nutshell 1 (1990). From 1984 to 1990, the U.S. government has forfeited property worth approximately $1.5 billion. *Foreword* to U.S. Dep't of Justice, *1990 Annual Report for the Department of Justice Asset Forfeiture Program.*

The government's appetite for property has not diminished. The most recent Justice Department annual report, for fiscal year 1993,[2] shows the cumulative income from Justice Department forfeitures doubled between

---

[2] No 1994 annual report has been published yet. We have been told by the Department of Justice that their annual report will no longer be available publicly -- henceforth it would be available only by Freedom of Information Act request.

1990 and 1993 -- from $1.5 billion to $3.24 billion. Figures released by Representative Henry Hyde at his June 22, 1995 press conference[3] show the Department of Justice made over $500 million in profits from forfeiture in 1994. See Exhibit A.

The Treasury Department's figures probably double the total amount forfeited since 1985, but Treasury's annual reports are not clear about the amount of income attributable to forfeiture.

During the eleven years since Congress enacted "modern" forfeiture laws, reports of abuses have been legion. Exposes in various newspapers and magazines[4] show the abuses are widespread and growing. U.S. Representative Henry Hyde (R. Ill.), chairman of the House

---

[3] Representative Hyde held the press conference to announce the introduction of his forfeiture reform bill, HR 1916.

[4] *See e.g.*, "License To Steal -- Take It Away," by Robert C. Bauman, *National Review*, February 20, 1995; Steven B. Duke & Albert C. Gross, "Casualties of War," *Reason*, February 1994; "Policing For Profits," by Mark Flatten, *Tempe (Arizona) Daily News Tribune*, November 21 - 26, 1993; John Dillin, "Government's Big Grab: Civil Forfeiture," *Christian Science Monitor*, September 28 & 30, 1993, October 1, 4 & 5, 1993; Richard Miniter, "Ill-Gotten Gains," *Reason Magazine*, August/September 1993; Gary Webb, "The Forfeiture Racket" and "The Money Tree," *San Jose Mercury News*, August 29-30, 1993; Arthur S. Hayes, "Civil Forfeiture Laws Are Under Attack," *Wall Street Journal*, January 14, 1993; Peter Gorman, "Forfeiture: The Seizing Of America," *High Times Magazine*, November & December 1992; Dennis Cauchon, "Forfeiture Law Called Biased, Reckless," *USA Today*, October 1, 1992; "War On Drugs Hitting Innocent Citizens," by Mike O'Callaghan, *Las Vegas Sun*, October 3, 1992; Jeff Brazil and Steve Berry, "Tainted Cash Or Easy Money?" *Orlando Sentinel*, June 14-17, 1992 (this series won a Pulitzer Prize); Andrew Schneider & Mary Pat Flaherty, "Presumed Guilty: The Law's Victims In the War on Drugs," *Pittsburgh Press*, August 11 - 16, 1991 August 18, 1991, December 22, 1991; T. Poor and K. Rose, "Hooked On The Drug War," *St. Louis Post-Dispatch*, April 28 - May 5, 1991.

Judiciary Committee, recently published a book exposing the abuses and calling for reform. *Forfeiting Our Property Rights* (Cato Institute, 1995).

Relying on "legal fictions" instead of the Constitution, the lower courts have allowed the government to punish people through forfeiture without having to comply with the presumption of innocence, the right to counsel, the "beyond a reasonable doubt" burden of proof, the excessive fines clause, or any of the other due process rights which are ordinarily guaranteed when the government attempts to impose punishment. Property owners are at a severe disadvantage fighting the endless resources of the federal government -- especially when the government has seized all the persons assets prior to trial.

When this Court handed down five decisions limiting the government's forfeiture practices in the 1992 term it appeared there would soon be relief from the rampant abuses. Instead, the government has learned to dodge due process obstacles and launder due process violations. It is business as usual for the forfeiture squads.

This Court's rulings in *Austin v. United States*, __ U.S. __, 113 S.Ct. 2801, 125 L.Ed.2d 448 (1993) and *Alexander v. United States*, __ U.S. __, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) have had little effect. Disproportionate forfeitures are still rampant because the lower courts have not adopted a meaningful test for proportionality. The only case which has had a significant impact on seizure practices is *United States v. James Daniel Good Real Property*, __ U.S. __, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993).

Now the lower courts have begun lowering the due process in criminal forfeitures, reasoning, as the Tenth Circuit did below, that criminal forfeiture is not a

substantive offense but "merely punishment" for another offense, and therefore criminal due process safeguards do not apply.

It is time the government's abusive forfeiture practices are reigned in. Forfeiture is punishment -- not "*merely* punishment" but punishment in the same sense as any other criminal count. The forfeiture of private property -- taken for public use without just compensation, as punishment for an offense -- should require the same due process protection as any other punishment.

> The institutional arrangement and incentive structure behind civil forfeiture necessitates protection of the due process rights of property owners. Guaranteeing due process rights for property owners will help channel self-interest away from unjustified applications of forfeiture laws to boost agency revenue and toward genuine efforts to eliminate criminal activity. Amicus brief of Institute for Justice in *United States v. James Daniel Good Real Property*, No. 92-1180, p. 17.

Guilty pleas and the plea bargaining process

The right to trial is an essential component of due process. Although guilty pleas have their utility in decreasing the costs of criminal prosecutions, providing an early resolution of the case, and preserving judicial economy, this utility cannot justify the sacrifice of constitutional rights.

A defendant's agreement to give up his right to trial on forfeiture counts and all the due process rights

inherent therein -- *must* be knowing and voluntary. The Constitution cannot tolerate anything less.

The government has a superior advantage over the criminal defendant in the plea bargaining process. That is the reason for the constitutional requirement, codified in Rule 11 of the Federal Rules of Criminal Procedure, that the court take pains to ensure that the defendant understands what he is agreeing to and what the potential consequences of his plea will be.

The government's advantage over the defendant is magnified exponentially when the government is also allowed to strip the defendant of all of his financial resources, before trial -- forcing him to rely on court appointed counsel or represent himself, and destroying his ability to support himself and his family.

Add to that the government's powerful incentive to increase forfeiture revenue, and the reasons for judicial scrutiny increase.

Punishment or substantive?

Before *Austin, supra*, the government argued (and the courts agreed) that forfeitures should be exempted from due process protection because forfeiture was *not punishment*.

This Court held in *Austin* that forfeiture *is* punishment.[5] Now, twisting *Austin*'s reasoning beyond comprehension, the lower courts -- including the Tenth Circuit in this case -- say that forfeiture is "merely

---

[5] *Austin* was a civil forfeiture case. Its companion case, *United States v. Alexander*, __ U.S. __, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) held that the same was true of criminal forfeitures.

punishment" and therefore, it does not require due process.

The argument that forfeiture is "merely punishment" and not a substantive offense has been used to lower the burden of proof in criminal forfeiture cases to "preponderance of the evidence" in many circuits.[6] It has also been used to dispense with the requirement that the court find a factual basis for a plea to a forfeiture count.[7]

Importance of property rights

The Constitution speaks of life, liberty and property in one breath. There is no reason why punishment by deprivation of property rights should be denigrated to a lesser status -- especially in a case such as this, where the forfeiture encompassed every asset the defendant owned, legitimate or not.

The Fifth Amendment "takings clause" says "nor shall private property be taken for a public use without just compensation." Forfeiture is apparently an exception to that rule. When private property is taken for public use under the forfeiture laws, the owner forfeits his right to just compensation.

---

[6] *United States v. Bieri*, 21 F.3d 819, 821 (8th Cir. 1994); *United States v. Elgersma*, 971 F.2d 690, 693 (11th Cir. 1992); *United States v. Smith*, 966 F.2d 1045, 1052 (6th Cir. 1992); *United States v. Herrero*, 893 F.2d 1512, 1541-42 (7th Cir.), cert. denied, 496 U.S. 927, 110 S.Ct. 2623, 110 L.Ed.2d 644 (1990); *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1577 (9th Cir. 1989); *United States v. Sandini*, 816 F.2d 869, 875 (3rd Cir. 1987).

[7] *United States v. Boatner*, 966 F.2d 1575 (11th Cir. 1992). *Boatner* was relied upon by the Tenth Circuit to deny Libretti the right to a finding of a factual basis for forfeiture.

Such takings must be afforded due process, however. When a forfeiture case is resolved against the property owner without a factual basis for forfeiture, it is a "taking" under the Fifth Amendment -- for, without a factual basis to "forfeit" an owner's right to just compensation for his private property, taken for public use, the government still owes the person "just compensation."

Forfeiture of estate

The wholesale forfeiture in this case is indistinguishable from the ancient practice of "forfeiture of estate," where a convicted felon automatically forfeited all his worldly possessions upon conviction of a felony. Our American system of capitalism depends upon the private ownership of property. Forfeiture of estate is automatic homelessness -- not only for the criminal defendant, but for his entire family.

With a criminal fine, on the other hand, the judge must consider the impact on innocent family members and the ability of the defendant to sustain himself, in setting the amount of the fine. 18 U.S.C. §3572(a).[8] Not so with forfeiture, at least as practiced to date. The courts give it all to the government in a blink, saying their hands are tied under the broad terms of the forfeiture statute.

The forfeiture of everything Libretti owned was decreed without regard to the proportionality requirement

---

[8] 18 U.S.C. §3572(b) requires that a fine not impair the defendant's ability to make restitution. Under the forfeiture laws, the government is often able to profit from a forfeiture at the expense of a defendants' victims, when restitution is rendered impossible by the pretrial restraint and subsequent forfeiture of the defendants' assets.

of *Alexander v. United States*, __ U.S. __, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993).

Counsel for Libretti makes an excellent argument, under Rule 11 of the Federal Rules of Criminal Procedure, for reversal of the Tenth Circuit's opinion. We believe reversal is also mandated by the U.S. Constitution.

I

A Guilty Plea to a Substantive Count Requires a Meeting Of The Minds And The Defendant's Voluntary Relinquishment Of His Right To Trial

There are two ways a defendant's factual guilt to a count in the indictment may be established -- by trial, or

> by the defendant's own solemn admission "in open court that he *is in fact guilty* of the offense with which he is charged," *Tollet v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973) (emphasis added), *i.e.*, by a plea of guilty.

Henderson v. Morgan, 426 U.S. 637, 648, 96 S.Ct. 2253, 2259, 49 L.Ed.2d 108 (1976), Justice White concurring.

In *Henderson*, a mentally retarded defendant pleaded guilty to second degree murder, admitting during the entry of the plea that he killed the victim. However, during the Rule 11 colloquy, the judge failed to advise him that intent to kill was an element of the offense. There was no indication that the defendant's attorney had advised him of the elements of the offense.

At a later evidentiary hearing, the defendant testified he would not have pleaded guilty if he had known intent to kill was an element of the offense.

This Court reversed the conviction, holding:

> such a plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense. And clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process."

Henderson, 426 U.S. at 644-645, 96 S.Ct. at 2257, quoting *Smith v. O'Grady*, 312 U.S. 329, 334, 61 S.Ct. 572, 574, 85 L.Ed. 859 (1941).

> [A]n admission by respondent that he killed Mrs. Francisco does not necessarily also admit that he was guilty of second-degree murder.
>
> There is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that respondent had the requisite intent. Defense counsel did not purport to stipulate to that fact; they did not explain to him that his plea would be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent. In these circumstances it is impossible to conclude that his plea to the unexplained charge of second-degree

murder was voluntary. *Henderson*, 426 U.S. at 646, 96 S.Ct. at 2258.

The Court stated in a footnote:

> There is no need in this case to decide whether notice of the true nature, or substance, of a charge always requires a description of every element of the offense; we assume it does not. Nevertheless, intent is such a critical element of the offense of second-degree murder that notice of that element is required. 426 U.S. at 647 n. 18, 96 S.Ct. at 2258 n. 18.

The same principles apply to the "property nexus" element in the forfeiture count. Criminal forfeiture under 21 U.S.C. §853 requires proof that either the property was proceeds of a drug offense or used to facilitate the drug offense, or that the property constituted an "interest in, claims against, [or] property or contractual rights affording a source of control over, the continuing criminal enterprise." 21 U.S.C. §853(a).

This additional element in the forfeiture count is sufficiently complex and obscure that a layman cannot be presumed to know and understand it without being advised by counsel or the court.

II

Criminal Forfeiture Is A Substantive Count Just Like Any Criminal Substantive Count, For Purposes of the Constitution

In the opinion below, the Tenth Circuit held that the due process required under Rule 11 and underlying constitutional principles for the waiver of rights at a guilty plea hearing do not apply to criminal forfeiture counts. The Tenth Circuit reasoned, with the acquiescence of Libretti's trial counsel, that

> criminal forfeiture under Section 853 is a part of the sentence, not a part of the substantive offense. *Libretti*, 38 F.3d at 528.

The court below also reasoned that Libretti may not have had a right to jury trial on the forfeiture count because

> "The Sixth Amendment never has been thought to guarantee a right to a jury determination [on punishment]." *Libretti*, 38 F.3d at 530, quoting *Spaziano v. Florida*, 468 U.S. 447, 459, 104 S.Ct. 3154, 3161, 82 L.Ed.2d 340 (1984).

That analysis is incorrect.

A criminal forfeiture count is not just "part of the sentence" but an actual substantive count that stands alone, and must be separately proven. Since it must be separately proven, it stands to reason that the right to trial on a forfeiture count must be independently waived.

The opinion below cites *United States v. Reckmeyer*, 786 F.2d 1216, 1222 (4th Cir.), cert. denied, 479 U.S. 850, 107 S.Ct. 177, 93 L.Ed.2d 113 (1986), which held:

> It is true that Fed.R.Crim.P. 11(f) requires the district court to inquire beyond the agreement to determine if there is a factual basis for the forfeiture of the assets. We agree with the reasoning of the Seventh Circuit in *United States v. Roberts* that "[t]he mere fact that the defendant has agreed an item is forfeitable in a plea agreement, does not make it so...." 749 F.2d 404, 409 (7th Cir. 1984), cert. denied, 470 U.S. 1058, 105 S.Ct. 1770, 84 L.Ed.2d 830 (1985).

The Fourth Circuit in *Reckmeyer* held that there was a sufficient factual basis for the forfeiture, since Reckmeyer had agreed in the plea agreement that his only significant source of income during the period in question was illegal drug proceeds.

Unlike Reckmeyer, however, Libretti had substantial legitimate income from his employment -- averaging close to $50,000 per year. There was no dispute that non-forfeitable assets had been seized. Nevertheless, the Tenth Circuit refused to follow the holding in *Reckmeyer*, stating that criminal forfeiture is merely punishment and not a substantive offense, and therefore there need not be a factual basis for the forfeiture.

The Tenth Circuit held that Libretti understood that he was forfeiting all his property, whether forfeitable or not, and that there was nothing improper about that. The court held that Libretti's plea "unambiguously

forfeited all his property." We disagree. The very words used by the Tenth Circuit show Libretti's interpretation of the plea bargain was reasonable.

> In this case, the district court thoroughly assessed whether defendant understood the consequences of the guilty plea. The court informed him that all property described in the CCE count of the indictment *could*[9] be forfeited.... Defendant only questioned the extent to which the $1,500,000 limit on forfeiture applied to future legitimate earnings. His attorney and the district court agreed that the $1,500,000 limit *applied only to products of drug transactions and not to legitimate future earnings*.[10] ...[The defendant] stated that he understood the consequences of his plea, including that all of his property *owned by reason of any drug transaction*[11] could be forfeited....
>
> Nothing in the record indicates defendant's plea would have been different if he had been questioned further about forfeitability of his assets. He intended to forfeit all of his property without requiring the

---

[9] Note that the court did not say that all the described property *would* be forfeited -- but only that it *could be forfeited*. This implies that discretion would be exercised in the future as to which property would be forfeited.

[10] This could be construed to imply that nonforfeitable property would not be forfeited under the plea bargain.

[11] This phrase belies the intent to forfeit untainted assets.

government to prove the assets were forfeitable...

Further, defendant received a favorable plea agreement. *In exchange for forfeiting all of his property,*[12] the government recommended the minimum sentence of twenty years imprisonment and agreed to drop all other counts in the indictment... Defendant entered into the plea agreement after the government presented overwhelming evidence of his guilt. He now seeks the benefit of that bargain, but only to the extent it favors him. We will not require the government to undergo a fact-finding hearing and forego a substantial benefit of its bargain.

We hold that defendant is bound by the terms of the plea agreement.... in which he unambiguously forfeited all of his property. The district court's *extraneous statements that defendant was only forfeiting assets listed in the CCE count*[13] of the indictment

---

[12] We are appalled at the suggestion that the courts should condone the forfeiture of untainted assets to "buy" a defendant a shorter sentence.

[13] We are puzzled by the Tenth Circuit's characterization of the trial court's statements as "extraneous." After all, the judge who accepted the plea is in a better position to judge the meaning of the parties. Also, the judge's remarks in the taking of the plea colored the defendant's understanding of his plea bargain -- as Rule 11 contemplates. The judge's role is to help the defendant understand his plea bargain, what he is giving up, and what he is getting in return. Thus, the trial judge's remarks are a legitimate part of the defendant's understanding of his plea agreement.

(continued...)

or from his drug trade do not establish that defendant did not knowingly and voluntarily forfeit all of his property. Rather, defendant agreed to forfeit all of his assets, including some that on their face had no connection with his drug dealings--e.g., "all bank accounts, investments, retirement accounts,"... Nothing in the agreement limits the forfeiture to those assets with an established factual basis for forfeiture. Defendant is also not limited to forfeiting only those assets directly related to the CCE conviction. Accordingly, the district court properly ordered on December 23, 1992, the forfeiture of all of defendant's assets based on defendant's written agreement and knowing and voluntary ratification of that agreement at the change of plea hearing. 38 F.3d at 529-530 (citations and footnotes omitted).

The Tenth Circuit not only held that it was not necessary to find a factual basis for the forfeiture, but went so far as to suggest that nonforfeitable assets could be traded by a wealthy defendant for a reduction in his term of incarceration. We believe the Tenth Circuit was wrong on both counts.

The Tenth Circuit rejected the holding in *Reckmeyer* by stating that criminal forfeiture is merely punishment, not a substantive offense. We believe the Tenth Circuit was wrong and the Fourth Circuit was right.

(...continued)

A. This Court Has Previously Recognized That Criminal Forfeiture Is a Substantive Count

This Court denied certiorari on the *Reckmeyer* case. But a related case, involving the forfeiture of Washington D.C. law firm Caplin & Drysdale's legal fees -- fees earned representing Reckmeyer in his criminal case -- *was* heard by this Court. *Caplin & Drysdale v. United States*, 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989).

Although this Court ultimately concluded, in *Caplin & Drysdale* ,that the Sixth Amendment was not violated when the attorneys fees of the defendants' counsel are forfeited, this Court made it clear that the power to forfeit is limited to property that is *made forfeitable* by statute:

> the Government has a pecuniary interest in forfeiture that goes beyond merely separating a criminal from his ill-gotten gains; that legitimate interest extends to recovering all *forfeitable assets*.

105 L.Ed.2d at 544 (emphasis added). The government's interest does not extend to the forfeiture of assets not made forfeitable by statute, and such property is available to the defendant to spend as he pleases.

> The forfeiture statute does not prevent a defendant who has *nonforfeitable assets* from retaining any attorney of his choosing.

105 L.Ed.2d at 541 (emphasis added).

More importantly, *Caplin & Drysdale* explicitly recognizes that criminal forfeiture "is a *substantive charge* in the indictment against a defendant," 105 L.Ed.2d 528, 543 n. 5 (emphasis added). Since criminal forfeiture is a substantive charge, its elements must be proven, the defendant has a right to a jury trial, and these rights may not be waived absent a Rule 11 query as to the count.

B. Characteristics of a Substantive Count of Criminal Forfeiture Under 21 U.S.C. §853

A criminal forfeiture count is not just "part of the sentence" but an actual substantive count that stands alone, and must be separately proven, just like any other criminal count.

The distinction between a "sentencing enhancement" and a criminal forfeiture count is substantial.

At sentencing, a judge may consider "relevant conduct" not charged in the indictment -- even conduct previously punished -- in enhancing a sentence, so long as the judge imposes a sentence "*within the legislatively authorized punishment range.*" *Witte v. United States*, __ U.S. __, __ S.Ct. __, __ L.Ed.2d __ (June 14, 1995) slip op. at __. However, criminal forfeiture is not within the "legislatively authorized punishment range" of a criminal count that authorizes a fine and imprisonment. Even 21 U.S.C. §848(a) -- which authorizes imprisonment, a fine and "the forfeiture prescribed in §853" -- requires separate compliance with the procedures and substantive requirements of §853 before a forfeiture order may be entered.

A criminal forfeiture count must be included in the indictment in order for the forfeiture to be considered. Section 853(e)(1) only allows the temporary *restraint* of

assets prior to indictment, and only in rare circumstances.[14] Implicit in Section 853 is the requirement that, absent a count in the indictment "alleging that the property ... would, in the event of conviction, be subject to forfeiture under this section"[15] -- no property could be forfeited.

Unlike sentencing enhancements, a forfeiture count includes elements which must be proven at trial before the jury can return a verdict of forfeiture. In addition to a violation of a title 21 U.S.C. felony, 21 U.S.C. §853 requires proof of the property's nexus[16] to crime. Section 853(a) requires proof that the property sought to be forfeited is either: (1) proceeds of the criminal activity for which the defendant was convicted, (2) property used or intended for use to facilitate the violation, or (3) in the case of a person convicted of engaging in a continuing criminal enterprise, the defendant's "interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise."

Under Fed.R.Crim.P. 31(e) the jury must specifically determine which assets are forfeitable under

---

[14] A preindictment restraining order is available only if the government shows a substantial likelihood of prevailing on the issue of forfeiture, and that the need to restrain the asset to preserve the availability of the property outweighs the hardship on opposing parties. Such a restraining order is only valid for 90 days. 21 U.S.C. §853(e)(1)(B). A temporary restraining order obtained without prior notice and opportunity to be heard, only if the government demonstrates, in addition to these requirements, that providing notice will jeopardize the availability of the property for forfeiture. A temporary restraining order is only valid 10 days. 21 U.S.C. §853(e)(2).

[15] 21 U.S.C. §853(e)(1)(A).

[16] Some jurisdictions require that there be a "substantial connection" to the criminal offense.

the facts of the case, and the standards of §853(a). Neither judge nor jury may decide to forfeit property unless a forfeiture count is included in the indictment and these requirements are met.

A defendant has a Sixth Amendment right to a jury trial on a criminal forfeiture count.[17] We believe that a forfeiture victim should also be afforded the right to counsel, either by releasing seized assets or providing court-appointed counsel at government expense. A decade of experience has shown that forfeiture victims are usually not qualified to represent themselves, and are no match for the superior resources of the federal government.

The elements of criminal forfeiture counts are not commonly known to laymen. This statute is new and complex. It had no counterpart in the common law. And forfeiture law has been constantly changing, often from one extreme to another, in the last few years.

Under the circumstances, Due Process demands that *at least* the defendant must be informed of the elements of the forfeiture count, and understand the consequences of the plea bargain before he can knowingly and voluntarily waive his right to trial on that count.

---

[17] *See e.g. United States v. Garrett*, 727 F.2d 1003 (11th Cir. 1984).

III

Third Party Rights Are Undermined When the Court Accepts a Plea to a Criminal Forfeiture Count Without Ascertaining That There Is A Factual Basis For The Forfeiture

Part III of Libretti's brief deals with third party rights in Libretti's criminal forfeiture. This is an issue that particularly concerns F.E.A.R. Foundation.

Like civil forfeiture victims, third parties in criminal forfeiture cases are provided very little due process. Often they see their Constitutional rights lightly brushed aside for years while the court processes the rights of the criminal defendant.

After the criminal forfeiture case is finally resolved against the criminal defendant, who has presumably enjoyed at least some measure of due process in the forfeiture of his property -- the innocent, or at least uncharged, third party who owns an interest in the criminally forfeited property -- finally gets some semblance of "process" -- but certainly not the process which is his due under the Fifth Amendment "takings" clause.

21 U.S.C. §853(n) provides the only remedies available to innocent owners in the criminal forfeiture context. There is no right to a jury trial, and the burden of proof is on the property owner to show by a preponderance of the evidence that he either had a

superior interest in the forfeited property,[18] or that he was a bona fide purchaser for value without notice of the grounds for forfeiture.[19]

If the third party tires of waiting until the criminal case is over or runs out of money to defend his property, he loses without the government ever having to show a factual basis for the seizure.

This process does not comport with the due process required for the taking of private property for public use -- particularly when the government enjoys an exemption from the just compensation requirement.

The defective protection of the property rights of innocent third parties is all the more reason to require the government to show a factual basis for forfeiture -- before getting to the resolution of third party claims.

A criminal defendant has no incentive to defend the property of third parties. In the plea bargaining process, he would understandably be more willing to bargain away someone else's property than his own. When the courts encourage criminal defendants to buy their way out of a longer prison sentence by forfeiting assets, the assets of others will always prove tempting.

Third parties deserve better protection of their property rights.

---

[18] 21 U.S.C. §853(n)(6)(A).

[19] 21 U.S.C. §853(n)(6)(B).

Conclusion

In order for a plea to be voluntary, it must be knowing. There must be a meeting of the minds as to what the defendant is getting and giving up in his bargain. There must be a determination by the court of a factual basis for the plea. None of those safeguards were provided here.

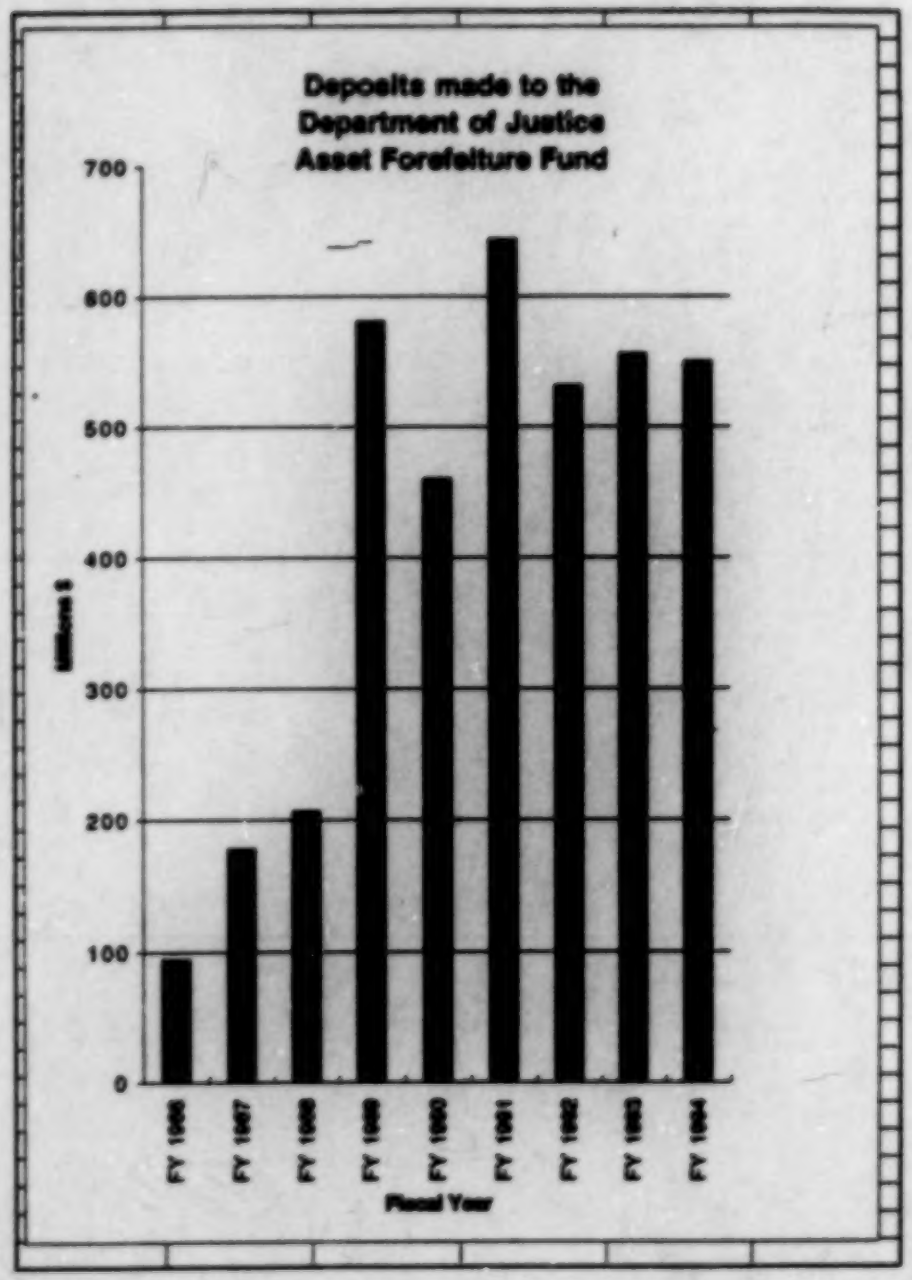
The due process requirements of Rule 11 are not burdensome on the government or the court. It is the least they should be expected to do to prevent unjust forfeitures in a legal setting so fraught with abuse.

For the foregoing reasons, *amicus curiae* Forfeiture Endangers American Rights Foundation respecfully requests that this honorable Court reverse the opinion below.

Respectfully submitted,

Brenda Grantland
Forfeiture Endangers
American Rights Foundation
265 Miller Avenue
Mill Valley CA 94941
(415) 380-9108
Attorney for Amicus Curiae

Dated: June 30, 1995



(10)

Supreme Court, U.S.
FILED
JUN 30 1995
OFFICE OF THE CLERK

No. 94-7427

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

JOSEPH V. LIBRETTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

DAVID B. SMITH*
526 King Street, Suite 213
Alexandria, VA 22314-3163
(703) 548-8911

RICHARD J. TROBERMAN
1301 Fifth Avenue, Suite 3500
Seattle, WA 98101-2650
(206) 343-1111

*Counsel of Record for
Amicus Curiae
National Association of
Criminal Defense Lawyers

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

26 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a trial court is required to make an inquiry to determine that there is a factual basis for a defendant's plea to a criminal forfeiture charged in an indictment or information.

2. Whether a trial court is required to advise a defendant of the right to a jury trial on criminal forfeitures which are charged in an indictment or information.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
INTEREST OF THE AMICUS 1
SUMMARY OF ARGUMENT 2
ARGUMENT 3

I. FEDERAL CRIMINAL RULE 11(f) REQUIRES THAT A COURT FIRST ASCERTAIN THAT THERE IS A FACTUAL AND LEGAL BASIS FOR THE FORFEITURE BEFORE ENTERING A JUDGMENT ON A PLEA TO A CRIMINAL FORFEITURE 3

A. The plain language of Fed.R.Crim.P. 11(f) requires the court to satisfy itself that there is a factual basis for an agreed forfeiture 3

B. Procedural safeguards are necessary to ensure that the forfeiture does not exceed what is allowed by statute due to prosecutorial overreaching or simple mistake . . 5

C. Procedural safeguards are necessary to protect third parties' property rights from unnecessary infringement 9

D. Rule 11(f) should apply to a criminal forfeiture plea because a defendant has a right to trial by jury on the issue of forfeiture 13

II. A PROFFER EXPLAINING WHY EACH ITEM OF PROPERTY IS SUBJECT TO FORFEITURE, AND PROVIDING A BRIEF STATEMENT OF THE FACTS SUPPORTING FORFEITURE, SHOULD BE DEEMED ADEQUATE TO ESTABLISH A FACTUAL BASIS FOR THE FORFEITURE 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases: **Page(s)**

Alexander v. United States, 509 U.S. ___, 113 S.Ct. 2766 (1993) 1

Austin v. United States, 509 U.S. ___, 113 S.Ct. 2801 (1993) 1, 2

Caplin & Drysdale Chartered v. United States, 491 U.S. 617, 109 S.Ct. 2646 (1989) 4, 13

Department of Revenue of Montana v. Kurth Ranch, et al., 511 U.S. ___, 114 S.Ct. 1937 (1994) . . 2

Guiffre v. Bissell, 31 F.3d 1241 (3d Cir. 1994) . . . 8, 9

Harmelin v. Michigan, 501 U.S. 957, 114 S.Ct. 2680 (1991) 6

Honda Motor Corp. v. Oberg, 511 U.S. ___, 114 S.Ct. 2331 (1994) 14

McCarthy v. United States, 394 U.S. 459, 89 S.Ct. 1166 (1969) 4

North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970) 4

Republic National Bank v. United States, 506 U.S. ___, 113 S.Ct. 554 (1992) 1

Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495 (1971) 4

United States v. A Parcel of Land (92 Buena Vista Avenue), 507 U.S. ___, 113 S.Ct. 1126 (1993) 1

United States v. Bachynsky, 949 F.2d 722 (5th Cir. 1991), *cert. denied*, 113 S.Ct. 150 (1992) . . . 2

United States v. BCCI Holdings (Luxumbourg), S.A., 46 F.3d 1185 (D.C. Cir. 1995) 10, 12

Cases: **Page(s)**

United States v. Boatner, 966 F.2d 1575 (11th Cir. 1992) 2, 8, 13, 15

United States v. De Ortiz, 910 F.2d 376 (7th Cir. 1990) 11

United States v. Elergsma, 929 F.2d 1538 (11th Cir.), *rev'd*, 971 F.2d 690 (11th Cir. 1992) (en banc) 11

United States v. Elliott, 727 F.Supp. 1126 (N.D.Ill. 1989) 6, 7

United States v. Garrett, 727 F.2d 1003 (11th Cir. 1984) 14

United States v. Halper, 490 U.S. 435, 109 S.Ct. 1892 (1989) 2

United States v. James Daniel Good Real Property, 510 U.S. ___, 114 S.Ct. 492 (1993) 1, 5

United States v. Libretti, 38 F.3d 523 (10th Cir. 1994) 2

United States v. Masters, 924 F.2d 1362 (7th Cir.), *cert. denied*, 111 S.Ct. 2019 (1991) 6

United States v. Milicia, 769 F.Supp. 877 (E.D.Pa. 1991) 6

United States v. Reckmeyer, 786 F.2d 1216 (4th Cir.), *cert. denied*, 479 U.S. 850 (1986) . 2, 15, 17

United States v. Roberson, 897 F.2d 1092 (11th Cir. 1990) 16

United States v. Roberts, 749 F.2d 404 (7th Cir. 1984), *cert. denied*, 470 U.S. 850 (1986) . . . 2, 14, 15

United States v. Robinson, 8 F.3d 418 (7th Cir. 1993) 14

Cases: **Page(s)**

United States v. Schwimmer, 968 F.2d 1570 (2nd Cir. 1992) 11

United States v. 122,942 Shares of Common Stock, 847 F.Supp. 105 (N.D.Ill. 1994) 7

United States v. $405,089.23 U.S. Currency, et al., 33 F.3d 1210 (9th Cir. 1994), *rehearing denied*, 1995 WL 321826 (1995) 2

Constitution, Statutes, Regulations and Rules:

U.S. Const., Amend. VI 14
18 U.S.C. App., Notes of the Advsory Commitee on Rules 4, 8
18 U.S.C. §1963(a) 6
18 U.S.C. §1963(l) 9, 10
18 U.S.C. §1963(m) 6
21 U.S.C. §848 14
21 U.S.C. §853 . . . . . 4, 11
21 U.S.C. §853(a) 6, 15, 16
21 U.S.C. §853(d) 16
21 U.S.C. §853(n) 9, 10, 12
21 U.S.C. §853(p) 6, 7, 16
Fed.R.Crim.P. 7(c)(2) 3, 14
Fed.R.Crim.P. 11(f) . . . . . *passim*
Fed.R.Crim.P. 31(e) 3, 13, 14
Rules of the Supreme Court, Rule 37.3 1

Miscellaneous:

Rep. Henry J. Hyde, *Forfeiting Our Property Rights*, CATO (1995) 5, 9
David B. Smith, *Prosecution and Defense of Forfeiture Cases*, Matthew Bender (1995) . . 11
S. Rep. No. 98-225, 98th Cong., 2d Sess. 209, *reprinted in* 1984 U.S.C.C.A.N. 3182 . . . . 10, 11

INTEREST OF THE AMICUS[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 8,700 attorneys and 28,000 affiliate members, including representatives from every state. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL was founded over thirty-five years ago to promote study and research in the field of criminal defense law; to disseminate and to advance knowledge of the law in the field of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers. Among NACDL's stated objectives is the promotion of the proper administration of criminal justice.

NACDL has long been troubled by the expanding use of civil and criminal forfeiture proceedings in our criminal justice system. We have deep concerns about the fairness of some of these laws and the aggressive way they are being used by state and federal prosecutors to inflict punishment and to deprive individuals of significant property interests, often without any of the constitutional and procedural protections generally accorded to either criminal or civil defendants.

In its past three terms, this Court has accepted review of five forfeiture cases.[2] In its decisions, the Court has endeavored to establish legal safeguards to appropriately restrain the gov-

---

[1] All parties have consented to the filing of this brief pursuant to Rule 37.3 of the Rules of the Supreme Court.

[2] *Republic National Bank v. United States*, 506 U.S. ___, 113 S.Ct. 554 (1992); *United States v. A Parcel of Land (92 Buena Vista Avenue)*, 507 U.S. ___, 113 S.Ct. 1126 (1993); *Alexander v. United States*, 509 U.S. ___, 113 S.Ct. 2766 (1993); *Austin v. United States*, 509 U.S. ___, 113 S.Ct. 2801 (1993); and *United States v. James Daniel Good Real Property*, 510 U.S. ___, 114 S.Ct. 492 (1993).

ernment's increasingly aggressive use and abuse of the forfeiture weapon. This case provides the Court with yet another opportunity to ensure that there are meaningful checks on the government's ability to confiscate a defendant's property as punishment for a criminal offense. Thus, NACDL has a vital interest in the outcome of this case, and urges the Court to reverse the decision below.[3]

SUMMARY OF ARGUMENT

Although the Federal Rules of Criminal Procedure require that a court satisfy itself that there is a factual basis for a plea of guilty, there is a conflict among the circuits on this issue of recurring importance as to whether Fed.R.Crim.P. 11(f) applies to criminal forfeitures listed in the indictment which are included as part of a plea agreement.[4]

---

[3] As a result of this Court's rulings in *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989), *Austin v. United States*, 509 U.S. ___, 113 S.Ct. 2801 (1993), and *Department of Revenue of Montana v. Kurth Ranch, et al.*, 511 U.S. ___, 114 S.Ct. 1937 (1994), the government, in order to avoid double jeopardy violations, will likely pursue criminal forfeitures as part of a single prosecution instead of relying on separate civil forfeiture proceedings as it has in the past. *See, e.g., United States v. $405,089.23 U.S. Currency, et al.*, 33 F.3d 1210 (9th Cir. 1994), *rehearing denied*, 1995 WL 321826 (May 30, 1995). Consequently, the number of cases involving criminal forfeitures is likely to increase significantly.

[4] *Cf. United States v. Roberts*, 749 F.2d 404, 409 (7th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985) and *United States v. Reckmeyer*, 786 F.2d 1216 (4th Cir.), *cert. denied*, 479 U.S. 850 (1986) (Rule 11(f) applies to forfeitures included as part of a plea agreement just as it applies to a guilty plea) with *United States v. Bachynsky*, 949 F.2d 722, 730 (5th Cir. 1991), *cert. denied*, 113 S.Ct. 150 (1992) (The requirement of Rule 11(f) that the factual basis for a plea be established at the plea hearing does not apply to an order of forfeiture) and *United States v. Boatner*, 966 F.2d 1575, 1581 (11th Cir. 1992) (Because the forfeiture provision is "not a substantive charge, but a sanction to which the parties agree as a result of the defendant's plea" Rule 11(f) only applies to the guilty plea). The Tenth Circuit in the case below rejected *Roberts* and *Reckmeyer* and agreed with *Boatner*. *United States v. Libretti*, 38 F.3d 523 (10th Cir. 1994).

Since criminal forfeitures must be charged in the indictment or information, Fed.R.Crim.P. 7(c)(2), are entered as a judgment, and cannot be imposed in the absence of a conviction by special verdict, Fed.R.Crim.P. 31(e), or by a plea to the forfeiture count, the requirements of Rule 11(f) are applicable to criminal forfeitures by the terms of the rules.

The application of Rule 11(f) to forfeiture proceedings is also logical and a matter of good policy. Due to the government's direct pecuniary interest in the outcome of forfeiture proceedings, procedural safeguards are necessary to ensure that the forfeiture does not exceed what is allowed by statute because of prosecutorial overreaching or mistake. Moreover, in light of the severely restricted substantive rights of third parties claiming an interest in forfeited property in cases involving criminal forfeitures, procedural safeguards are necessary to protect innocent third parties' property rights from unnecessary infringement.

ARGUMENT

I. FEDERAL CRIMINAL RULE 11(f) REQUIRES THAT A COURT FIRST ASCERTAIN THAT THERE IS A FACTUAL AND LEGAL BASIS FOR THE FORFEITURE BEFORE ENTERING A JUDGMENT ON A PLEA TO A CRIMINAL FORFEITURE.

A. The plain language of Fed.R.Crim.P. 11(f) requires the court to satisfy itself that there is a factual basis for an agreed forfeiture.

Rule 11(f) provides as follows:

> **(f). Determining Accuracy of the Plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such a plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

The issue before the Court is whether the forfeiture of assets in a criminal prosecution pursuant to 21 U.S.C. §853 is a part of "the plea" as contemplated by Rule 11(f). The language of Rule 11(f) clearly reaches both components of a plea involving the criminal forfeiture of property: (1) the defendant's admission of guilt and (2) the defendant's concession that the property named in the indictment is subject to forfeiture.

As the Advisory Committee observed, an inquiry pursuant to Rule 11(f) should, among other things, "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the *charge* but without realizing that his conduct does not actually fall within the *charge*." 18 U.S.C. App., Notes of the Advisory Committee on Rules, 1966 Amendment (emphasis supplied). This Court has previously recognized that "forfeiture is a substantive charge in the indictment against a defendant." *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 109 S.Ct. 2646, 2654 n.5 (1989). Moreover, this Court has recognized the important role that the factual basis inquiry plays in ensuring that pleas are knowing and voluntary. Thus, despite Rule 11's use of "should," and its seeming grant of broad discretion in the scope of the inquiry to be made, this Court in *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495 (1971), described the "factual basis" inquiry as mandatory. Indeed, given that *Santobello* reached the Court from a state court, it is apparent that this Court viewed that mandate as a requisite of constitutional due process. *See also North Carolina v. Alford*, 400 U.S. 25, 33, 91 S.Ct. 160, 167 (1970); *McCarthy v. United States*, 394 U.S. 459, 465, 89 S.Ct. 1166, 1170 (1969).

B. Procedural safeguards are necessary to ensure that the forfeiture does not exceed what is allowed by statute due to prosecutorial overreaching or simple mistake.

In *United States v. James Daniel Good Real Property*, *supra*, this Court acknowledged the extent of the government's financial stake in forfeiture. Because the government has a "direct pecuniary interest in the outcome of the proceeding," *id.* 114 S.Ct. at 502, there is a heightened risk of prosecutorial overreaching.[5] The Court has traditionally recognized the need for special scrutiny where the government stands to benefit financially from the imposition of sanctions as a result of criminal conduct:

> There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit. *See United States Trust Co. of New York v. New Jersey*, 431 U.S.1, 25-26, 97 S.Ct. 1505 (1977); *Perry v. United States*, 294 U.S. 330, 350-351, 56 S.Ct. 432 (1935).

---

[5] Petitioner Libretti's plea agreement contains an unusual provision earmarking *all* of the forfeited assets for the Criminal Investigations Division of the Wyoming Attorney General's Office. Consequently, the law enforcement agency which investigated the case will receive a large cash bounty for its efforts whereas the United States, which successfully prosecuted the case, will receive none of the forfeited assets. House Judiciary Committee Chairman Henry Hyde (R-Ill) documents the abuses to which this "earmarking" system has led in his new book, *Forfeiting Our Property Rights* (CATO, 1995).

Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680, 2693, n.9 (1991) (Scalia, J., concurring).

Criminal forfeiture usually occurs in the context of drug, money laundering, or racketeering offenses carrying severe sentences. Therefore, prosecutors can exert tremendous pressure on defendants to agree to forfeit their property in exchange for concessions which reduce the anticipated prison sentence. That is what happened in the case at bar, and it is a common occurrence in our federal criminal justice system. Defendants are frequently persuaded to agree to forfeit all, or substantially all, of their assets as part of a plea bargain which allows them to avoid what would otherwise be a life sentence or an extremely long prison term. The government often insists that the defendant agree to forfeit untainted property not otherwise subject to forfeiture, as occurred in this case, on the theory that the untainted property is a "substitute asset" for tainted property the government is unable to seize. *See* 21 U.S.C. §853(p) and 18 U.S.C. § 1963(m).

Not surprisingly, the government's estimate of the total amount of property subject to forfeiture is frequently exaggerated. For example, the government often assumes (without any evidence to support the assumption) that in a drug trafficking conspiracy the drug trafficker sold the same amount of drugs every week for the entire duration of the conspiracy. Moreover, in assessing the amount of "proceeds" subject to forfeiture, the government does not allow for the costs incurred by the trafficker, in particular, the cost of the drugs sold.[6] Through such

[6] In our view, the term "proceeds" in 21 U.S.C. § 853(a)(1) and 18 U.S.C. § 1963(a)(3) refers to "net, not gross, revenues—profits, not sales, for only the former are gains." *United States v. Masters*, 924 F.2d 1362, 1369-70 (7th Cir.), *cert. denied*, 111 S.Ct. 2019 (1991). *Accord, United States v. Milicia*, 769 F.Supp. 877 (E.D.Pa. 1991) (pharmacist convicted of dispensing controlled substances illegally was allowed a deduction for wholesale cost of illegal prescriptions he filled — 60% of gross receipts — in calculating amount of proceeds subject to forfeiture under § 853(a)(1)); *United States v. Elliott*, 727 F.Supp. 1126 (N.D. Ill. 1989) (government conceded that purchase price of stock had to be deducted from sales price to calculate forfeitable proceeds from illegal stock transactions). *See also, United States v. 122,942 Shares of Common Stock*, 847 F.Supp. 105 (N.D.Ill. 1994) (construing term "proceeds" in 18 U.S.C. § 981(a)(1)(C) to encompass only the profit from fraudulent stock transaction, not all the property acquired as a result of the transaction).

In the case at bar, the government calculated petitioner's total drug "proceeds" at $1.5 million, apparently treating his gross revenue from drug trafficking as "proceeds" and allowing no deduction for the cost of the drugs sold by petitioner. However, all of petitioner's property was appraised at only $410,000. Moreover, some of petitioner's property was clearly purchased with legitimate income. For example, the government forfeited his 401(k) employee savings plan with General Chemical, his IRA accounts, and bank accounts in which petitioner deposited his General Chemical paychecks. Petitioner was employed by General Chemical Corp., Green River, Wyoming as a full-time accounting supervisor earning $40,000 to $50,000 per year from June 1, 1989 until his arrest on December 4, 1991. Petitioner's employment history prior to his job at General Chemical is described in the Presentence Report ¶¶ 36-37.

artificial calculations, the government can easily contrive a figure for drug proceeds garnered by the defendant which greatly exceeds the defendant's total assets. In the government's view, this "cocktail napkin" calculation justifies stripping a defendant of all of his or her property, no matter how or when acquired, because the amount of the forfeiture is less than the government's inflated estimate of the total amount of the defendant's drug "proceeds." The substitute assets provision, 21 U.S.C. § 853(p), is relied upon by the government to forfeit the defendant's untainted property as well as property whose source is not known.

Defendants who are faced with draconian prison sentences under the federal sentencing guidelines (U.S.S.G.) have no real choice but to take whatever "deal" is offered to them by the government, even if it includes forfeiture of *all* their property, including untainted property as well as tainted assets. Thus, it is essential for courts accepting a plea which includes a criminal

(or a related civil) forfeiture to inquire into the factual basis for the forfeiture. Unless such an inquiry is mandated, nothing prevents the government from using its naked, unchecked power to coerce a defendant's allegedly "voluntary" relinquishment of his property rights.[7] *See e.g., Guiffre v. Bissell*, 31 F.3d 1241 (3d Cir. 1994).[8]

---

[7] In *United States v. Boatner, supra*, the Eleventh Circuit reasoned that because the forfeiture in that case represented "a bargained for exchange between the parties," Rule 11(f) did not require the judge to determine whether there was a factual basis for the defendant's agreement to a criminal forfeiture. The Tenth Circuit adopted that reasoning in this case. 38 F.2d at 528-29. This rationale is unpersuasive because of the vastly unequal bargaining power of the defendant in most cases. All plea agreements are bargained-for exchanges between the parties. That alone does not justify dispensing with any factual inquiry into the basis for the guilty plea. It likewise cannot justify dispensing with a factual inquiry into the basis for the agreed forfeiture. The plea inquiry is designed to protect the defendant against prosecutorial overreaching and to ensure that the defendant's plea is knowing, intelligent and voluntary. 18 U.S.C. App., Notes of the Advisory Committee on Rules, 1966 Amendment. Those concerns are equally valid — perhaps even more so, in light of the government's direct pecuniary interest — with respect to criminal forfeiture.

[8] James Guiffre was arrested on May 10, 1990 in Somerset County, New Jersey and threatened with felony drug charges carrying 10 years in prison and forfeiture of his residence unless he cooperated in an ongoing investigation and signed over deeds to two building lots he had bought in 1988 for $174,000. Within 24 hours of his arrest, and after having been repeatedly refused an opportunity to consult an attorney, Guiffre signed over the deeds to the two lots for $1. Pursuant to the unwritten agreement between Guiffre, the prosecutor (Bissell) and the chief of detectives for the County Prosecutor's Office (Thornburgh), all charges against Guiffre were ultimately dismissed.

In a subsequent civil rights action, Guiffre alleged that he had made it clear to Chief Thornburgh that "not one cent of illegal money [was] used to buy those lots." 31 F.3d at 1249. Guiffre also alleged that Chief Thornburgh threatened that if he refused to take the deal being offered to him his home and the building lots would be forfeited; his fiancee would be put out of the house they shared and possibly face criminal charges herself; he would "rot

C. Procedural safeguards are necessary to protect third parties' property rights from unnecessary infringement.

Another important reason why a court should be required to find that there is a factual basis for an agreed criminal forfeiture is to protect the rights of innocent third parties. If the court accepts a guilty plea which includes property forfeitures, and enters a judgment of forfeiture at sentencing, that judgment profoundly impairs the property rights of any third party who has an interest in the forfeited assets.[9] Although the federal criminal forfeiture statutes provide a procedure whereby certain third parties are allowed to appear and request that the court adjudicate their claims to the forfeited property, a third party's rights are severely limited under these statutes. 21 U.S.C. §853(n); 18 U.S.C. §1963(1).

---

in jail for a year" before going to trial, and he would lose his professional licenses. Chief Thornburgh allegedly gave Guiffre an hour to make up his mind and forbad him from speaking first with an attorney. *Id.* At the direction of Chief Thornburgh, Guiffre signed a statement averring that the two building lots were purchased *in part* with illegal drug money. *Id.* at 1244, 1249.

Guiffre also alleged that, in July 1990, Prosecutor Bissell told him he would have the first opportunity to buy back his building lots, but his offer of $100,000 cash for the lots was later rejected by Bissell as insufficient. Each lot was later sold at a public sale for only $10,000. They were subsequently transferred to two individuals with alleged ties to the Prosecutor's Office. *Id.* at 1252.

Somerset County, N.J. ranks *thirteenth* in population in that state but *first* in assets seized for forfeiture. Rep. Henry Hyde, *Forfeiting Our Property Rights*, CATO (1995) at 36. Prosecutor Nicholas Bissell, Jr., who controls the forfeited money, placed $300,000 from the county forfeiture fund in a small bank (with deposits of $1.8 million) owned by Bissell's longtime business associate. Bissell spent $6,000 from the fund to buy private tennis club memberships for his assistant prosecutors and police detectives. *Id.* at 36.

[9] By contrast, a defendant's guilty plea does not implicate any third party's rights.

In order to prevail in a criminal forfeiture proceeding, a third party petitioner must establish by a preponderance of the evidence that (1) the petitioner has a legal right, title or interest in the property which renders the order of forfeiture invalid in whole or in part because the right, title or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture; or (2) petitioner is a bona fide purchaser for value of the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture. 21 U.S.C. § 853(n)(6); 18 U.S.C. § 1963(l)(6).

Not content with narrowly restricting the substantive rights of third parties claiming an interest in forfeited property in cases involving criminal forfeitures, Congress, at the urging of the government, also placed the burden of proof on the third party, and denied third parties the right to a jury trial.[10] Thus, a third party claiming an interest in property that has been criminally forfeited as a result of another person's crime is at a significant disadvantage vis-a-vis the government and enjoys even *fewer* rights than the accused or than a claimant in a civil forfeiture proceeding under the customs laws.

Congress narrowly restricted third party rights in the so-called ancillary hearing on the assumption that a judgment of criminal forfeiture entered against the criminal defendant is a highly reliable determination that the property is in fact subject to criminal forfeiture. *See* S. Rep. No. 98-225, 98th Cong., 2d

[10] Despite the fact that the third party provisions were enacted in 1984, there is still a complete absence of caselaw discussing the constitutionality of placing the burden of proof on the third party and the denial of a right to trial by jury. Prior to 1984, third parties claiming an interest in forfeited property could only petition the Attorney General for relief by way of remission — a scheme that obviously violated their due process rights. *See, United States v. BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185, 1190 (D.C. Cir. 1995).

Sess. 209, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3392 ("Since the United States will have already proven its forfeiture allegations in the criminal case beyond a reasonable doubt, the burden of proof at the hearing will be on the third party."). That underlying premise may be valid when, after a trial, the elements of forfeiture are found beyond a reasonable doubt by the trier of fact.[11] However, the premise cannot be valid where the defendant agrees to forfeiture as part of a plea agreement unless the court is required to find a substantial factual basis for the forfeiture.

A defendant may readily agree to the forfeiture of property he or she never owned. Unless the court inquires into the facts, it may unknowingly enter a judgment of forfeiture which unfairly impairs or destroys the rights of the true owner of the property. Why should a defendant care about such property? Moreover, the criminal forfeiture statutes explicitly reach otherwise forfeitable property that has been transferred to a third party prior to the indictment. The criminal defendant may have little or no interest in preventing the forfeiture of property which has been transferred to a third party. *United States v. De Ortiz*, 910 F.2d 376, 384 (7th Cir. 1990) ("a defendant will have no incentive to avoid agreeing to the forfeiture of assets which he or she has already transferred to a third party."); *United States v. Schwimmer*, 968 F.2d 1570, 1580-81 (2d Cir. 1992).

[11] Even then, however, Congress ignored the fact that many criminal defendants will simply have no interest in contesting the forfeiture of property they never owned or have transferred to third parties, or will not be effectively represented with respect to forfeiture issues.

It is worth noting that most of the lower courts have erroneously held that the government need only prove its case for forfeiture under 21 U.S.C. ¶ 853 by a preponderance of the evidence, despite clear indications in the legislative history that Congress intended the burden of proof to remain beyond a reasonable doubt, as under the RICO criminal forfeiture provisions. *See United States v. Elgersma*, 929 F.2d 1538 (11th Cir.), *rev'd*, 971 F.2d 690 (11th Cir. 1992) (en banc); 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, ¶ 14.03 (1995).

Even if the defendant *is* the current owner of the forfeited property, the forfeiture to which the defendant agrees may severely affect innocent third parties. In the *BCCI* case, for example, BCCI-related corporate entities under the control of court-appointed receivers agreed, pursuant to a plea agreement, to criminal forfeiture of all $552 million of their assets in the United States. That plea agreement forced all of BCCI's numerous foreign general creditors to petition the district court for relief from the forfeiture. To date, over a hundred petitions to amend the orders of forfeiture have been filed from all over the world. The district court has dismissed all or virtually all the petitions on standing and other grounds. *United States v. BCCI Holdings (Luxembourg), S.A.*, 833 F.Supp. 32, 35 n.6 (D.D.C. 1993), *aff'd*, 46 F.3d 1185 (D.C. Cir. 1995).

In the case before the Court, several third party claims were made to the forfeited property. The district court's disposition of these claims illustrates how third party property rights may be infringed or destroyed by improvident forfeiture pleas. For example, Claudia Porter petitioned the court for the return of a diamond engagement ring she received from Libretti in 1990. The trial court held (J.A. 306) that the ring had been purchased with legitimate funds and that Ms. Porter was an innocent owner entitled to the return of the ring.[12] Because the court did not inquire into whether there was a factual basis for the forfeiture of the ring at the time it accepted Libretti's plea, Ms. Porter was forced to enter the case as a third party petitioner to defend her property right in the ring.

---

[12] Notwithstanding the trial court's ruling, because Ms. Porter received the ring as a gift (not as a bona fide purchaser for value) *after* petitioner's offense had begun, Ms. Porter was not eligible for relief pursuant to 21 U.S.C. §853(n)(6). In other words, Libretti's plea agreement, as interpreted by the government and the Tenth Circuit, extinguished Ms. Porter's property rights in her engagement ring even though the ring did not belong to petitioner at the time of the plea agreement and even though it was purchased with untainted funds!

Petitioner's brief also demonstrates how the property rights of petitioner's parents, Dr. and Mrs. Libretti, were adversely affected by the plea agreement. According to the government's theory, when Libretti agreed to forfeiture as part of his plea bargain, the government was not required to make any factual showing whatsoever, at any time, before shifting the burden of proof to any third party owners. Thus, because Libretti had "agreed" to the forfeiture of assets owned by his parents, Dr. and Mrs. Libretti were forced to become parties to the forfeiture proceeding, at considerable expense and inconvenience, in order to prevent the forfeiture of property in which they had a legitimate interest and which was clearly outside the scope of Libretti's alleged (and admitted) criminal activity. Libretti's plea agreement, as interpreted by the government and the Tenth Circuit, deprived Dr. and Mrs. Libretti of the right to a jury trial in the third party proceeding, and further required them to carry the burden in the third party proceeding of proving that their property was not subject to forfeiture.

D. Rule 11(f) should apply to a criminal forfeiture plea because a defendant has a right to trial by jury on the issue of forfeiture.

The courts which have held that the trial court is not required under Rule 11 to determine whether there is a factual basis for a defendant's concession to a criminal forfeiture have reasoned that, because forfeiture is not a substantive charge but rather a sanction to which the parties agree, Rule 11(f) does not apply. However, it is irrelevant for present purposes whether forfeiture is conceived of as a charge in the indictment, *Caplin & Drysdale, Chartered v. United States*, *supra*, 109 S.Ct. at 2654 n.5 (1989) ("forfeiture is a substantive charge in the indictment"), an element of the offense, Rule 31(e) and Advisory Committee Notes ("the amount of the interest or property subject to criminal forfeiture is an element of the offense"), or as a sanction (*e.g.*, *United States v. Boatner*, *supra*).

What is crucial here is that the defendant has a statutory right (and, we submit, a constitutional right) to a jury trial on the issue of forfeiture. Rule 31(e), Fed.R.Crim.P.; *United States v. Garrett*, 727 F.2d 1003, 1012 (11th Cir. 1984) (defendant has Sixth Amendment right to jury trial on issue of whether an asset may be forfeited under 21 U.S.C. § 848), *aff'd on other grounds*, 471 U.S. 773 (1985). *See also Honda Motor Corp. v. Oberg*, 114 S.Ct. 2331 (1994) (where a person has been deprived of liberty or property without the safeguards of a common law procedure which would have provided protection against arbitrary and inaccurate adjudication, "this Court has not hesitated to find the proceedings violative of Due Process.").[13]

"[A] defendant's waiver of his statutory right to have a jury determine which portion of his property is subject to forfeiture is only valid if knowingly and voluntarily made." *United States v. Robinson*, 8 F.3d 418, 421 (7th Cir. 1993). The defendant's waiver cannot be *knowing and intelligent* unless there is a factual basis for believing that the property is subject to forfeiture. *See United States v. Roberts*, 749 F.2d 404, 410 (7th Cir. 1984), *cert. denied*, 470 U.S. 1058 (1985). As petitioner argues in his brief, the requirement that there be a factual basis for a guilty plea to a forfeiture charge is "a necessary correlative to the procedural protections for criminal forfeiture afforded in Rule 7(c)(2) and Rule 31(e)" of the Rules of Criminal Procedure.

---

[13] Congress viewed the RICO statute and 21 U.S.C. § 848 "as reestablishing a limited common law criminal forfeiture. Under the common law, in a criminal forfeiture proceeding the defendant was apparently entitled to notice, trial, and a special jury finding on the factual issues surrounding the declaration of forfeiture which followed his criminal conviction." Fed.R.Crim.P. 7(c)(2) Advisory Committee notes (1972 amendment).

II. A PROFFER EXPLAINING WHY EACH ITEM OF PROPERTY IS SUBJECT TO FORFEITURE, AND PROVIDING A BRIEF STATEMENT OF THE FACTS SUPPORTING FORFEITURE, SHOULD BE DEEMED ADEQUATE TO ESTABLISH A FACTUAL BASIS FOR THE FORFEITURE.

It should not be enough for a defendant to merely *stipulate* that each property item is subject to forfeiture, because that would provide no real protection against prosecutorial overreaching. As discussed above, a defendant may readily stipulate to the forfeiture of property he doesn't own, thereby unfairly impairing third party rights. A defendant may also stipulate to the forfeiture of his own property, regardless of whether it is forfeitable, in order to take advantage of a plea agreement that will result in a lesser sentence. "The mere fact that the defendant has agreed that an item is forfeitable, in a plea agreement, does not make it so; the trial court must ascertain whether it [is subject to forfeiture under the statute.]" *United States v. Roberts*, *supra*, 749 F.2d at 409. *Accord United States v. Reckmeyer*, 786 F.2d 1216. 1222 (4th Cir.), *cert. denied*, 479 U.S. 850 (1986). *But see United States v. Boatner, supra.*

On the other hand, if the government is required to provide too detailed a proffer of evidence to support forfeiture, this could impose an unwarranted burden on the prosecutor and the court. Thus, a reasonable balance needs to be struck.

The factual proffer should explain why each item of property is subject to forfeiture, and provide a brief statement of the facts supporting forfeiture under that theory. In the case of facilitating property under § 853(a)(2), the proffer should succinctly set forth how and when each asset facilitated the underlying drug offense(s). For example: "On January 1, 1992, the defendant's Ford pick-up truck was used to transport a bale of marijuana from the stash house on his farm to the parking lot

behind the 7-11 store on Main Street, Anytown, where it was sold to John Doe."

In the case of drug proceeds subject to forfeiture under § 853(a)(1), it is normally not feasible to establish the factual basis as precisely as with facilitation property. The government typically relies upon the statutory presumption in § 853(d) to establish that the property is drug proceeds. In such case, the government should proffer the essential facts upon which it relies to trigger the § 853(d) presumption. That is, the proffer should state approximately when the property was acquired by the defendant, that the acquisition was during the period of the violation or within a reasonable time after such period, and that there was no likely source for such property other than the drug violation. 21 U.S.C. § 853(d). If the defendant had no other substantial source of income during the relevant period of time, it is easy to so state. If the defendant did have another substantial source of income — as in this case — the proffer should explain the government's basis for believing that the particular assets sought to be forfeited were acquired with drug income.

Similarly, if the government's theory is that the property should be forfeited as "substitute assets" under § 853(p), the factual proffer should state the basis upon which the substitute assets provision is invoked, *e.g.*, how, as a result of an act or omission of the defendant, otherwise forfeitable property "cannot be located upon the exercise of due diligence" (§ 853(p)(1)) or "has been transferred or sold to, or deposited with, a third party" (§ 853(p)(2)). It should also explain how the government valued the otherwise forfeitable property and the substitute assets that are to be forfeited in lieu of the tainted but unavailable property. *See United States v. Roberson*, 897 F.2d 1092, 1097-98 (11th Cir. 1990).

Requiring the government to prepare such a statement of the facts supporting the agreed upon forfeiture would not be unduly burdensome even in cases such as this one where numer-

ous discrete items of property were forfeited.[14] The exercise of preparing such a statement for scrutiny by the court will force the prosecutor and the court to think about whether *all* of the property being confiscated is *actually subject* to criminal forfeiture. To the extent that this process prevents the initial forfeiture of property belonging to third parties, it will promote fairness and may conserve scarce judicial resources by obviating the need for a later ancillary hearing on third party claims.

---

[14] In the typical case where the drug defendant has insignificant legitimate income, it will be very easy for the government to show an adequate factual basis for the forfeitures. *See, e.g., United States v. Reckmeyer*, 786 F.2d at 1222 (holding that Rule 11 proceeding established a sufficient factual basis for the forfeiture of the 41 items specified in the indictment and included in the plea agreement based on value of forfeited assets and Reckmeyer's insignificant legitimate income from 1974 through January 1975).

CONCLUSION

For the foregoing reasons, NACDL as amicus curiae respectfully urges this Court to reverse the decision of the Tenth Circuit Court of Appeals, and to hold that Fed.R.Crim.P. 11(f) requires a trial court to ascertain that there is a legal and factual basis for the forfeiture before entering a judgment on a plea to a criminal forfeiture as charged in an indictment or information.

Respectfully submitted,

DAVID B. SMITH*
526 King Street, Suite 213
Alexandria, VA 22314-3163
(703) 548-8911

RICHARD J. TROBERMAN
1301 Fifth Avenue, Suite 3500
Seattle, WA 98101-2650
(206) 343-1111

*Counsel of Record for
Amicus Curiae
National Association of
Criminal Defense Lawyers

June 30, 1995